

1973

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Arthur R. Landever, *Regional Commissions to Monitor Confinement Institutions: A Proposal*, 22 Clev. St. L. Rev. 450 (1973)
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Regional Commissions to Monitor Confinement Institutions: A Proposal

*Arthur R. Landever**

ON ANY GIVEN DAY, THERE ARE MORE THAN one million persons involuntarily confined within government institutions.¹ Those in custody whether committed to mental institutions, jails, juvenile facilities, or prisons, are the invisible Americans. Until recently, most of us on the outside were not particularly concerned about their lot. To the extent that we knew of their existence, we were relieved that they were out of our immediate neighborhoods and that we were "protected" from them. Increasingly, however, newspaper headlines or television screens have begun to show glimpses of these inmates as they riot; widespread abuses are exposed, and authorities across the ideological spectrum bemoan the non-treatment, inhumanity, or "schools for crime" found within the walls of their closed societies.

Paralleling these developments have been the still fledgling efforts of the courts to grant relief in cases of infringement upon confinee rights. But the legal remedies have proven inadequate, considering the kinds of needs manifested, the general absence of identifiable standards under existing statutes, the hesitancy of judges to intervene, and the cumbersome, time-consuming nature of the judicial process.

To fill the remedy gap, an array of reform proposals have been paraded before congressional committees, special commissions, and state legislatures. Proposals include community-based treatment centers for the mentally ill or mentally retarded, use of less restrictive alternatives such as outpatient clinics, screening of individuals to avoid the criminal process, pre-trial diversion, probation with supportive services, furloughs from confinement institutions, work or educational release, use of volunteers from the community to put on

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¹ The figure is a conservative one. There are approximately 1,300,000 people under correctional supervision. About 400,00 are in correctional institutions. Approximately 160,000 of these are in the nation's 4,037 jails and detention facilities. ABA STATE-WIDE JAIL STANDARDS AND INSPECTION SYSTEMS PROJECT OF THE ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES SURVEY AND HANDBOOK ON STATE STANDARDS AND INSPECTION LEGISLATION FOR JAILS AND JUVENILE DETENTION FACILITIES (1973); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE — 1967, CHALLENGE OF CRIME IN A FREE SOCIETY 386 (1968) [hereinafter cited as 1967 PRESIDENTIAL REPORT]. In 1972, there were 3,000,000 persons treated annually for mental illness. Of these, one of four is treated in a state hospital, one in a private, city or federal hospital, and two on an outpatient basis. See New York Times, July 30, 1972, at 28, col. 1; in practice, most of those in state hospitals are there in some involuntary status, whether expressly involuntary or in some other status. See B. ENNIS and L. SIEGEL, THE RIGHTS OF MENTAL PATIENTS, AN ACLU HANDBOOK, (1973), at 36 [hereinafter cited as ENNIS & SIEGEL].

institutional programming, inmate advisory councils, prisoner unions, promulgation of standardized rules for disciplinary action, establishment of grievance mechanisms, appointment of ombudsmen, employment of arbitrators, periodic inspection, and use of accrediting agencies.

These proposals reflect the mood of change that is in the air. Yet it remains unclear what adverse effects will be produced. Most authorities agree that there should be substantially increased community-based approaches, as well as improved assurance of rights and available grievance mechanisms for those who remain confined. Nonetheless, uncertainty stems from several factors: empirical data is woefully lacking; present staffs (whose cooperation would seem essential) may be suspicious, embittered, or simply unprepared by reason of background to support "liberal-minded" reformers or directors; communities may well be ill-equipped or unwilling to receive and support the individuals who are returned to them; increased publicity given to changes could fan the fires of rising expectations and then lead to greater frustration and turmoil; reforms may be perceived as threatening the political bailiwicks of diverse interests; undoubtedly, some of those returned to communities or permitted enlarged freedom within institutions would increase the risks of danger to staff and society; the monitoring approaches could intrude further upon the privacy of individuals within the institutions under scrutiny; accepting notions of right to treatment could increase the risk of subjecting the "resident" to unwanted medication, treatment, or behavior conditioning; the new community approaches certainly would be no panacea; indeed they could prove to be merely an employment-enriching opportunity for the "treating" professions; dedicated administrators might opt to leave the systems rather than to subject themselves to comprehensive monitoring.

Given this uncertainty, we do well to consider carefully any additional remedies before we are overwhelmed by the confusion of devices and programs. Notwithstanding this caveat, the author does present a proposal. It is offered to provide a key missing element in this environment of diversion programming and the acknowledged need to provide monitoring systems. What is lacking are structures with the requisite accountability, credibility, and competence to develop, standardize, and coordinate such efforts.

The author proposes the establishment of regional commissions within each state accountable to a state board to provide these structures. Members of the board would be chosen, in equal number, by the executive, legislative, and judicial branches. Each commission would be composed of individuals with backgrounds in law, mental health, corrections, the social sciences, and accounting. Moreover, current institutional personnel as well as ex-inmates would serve. Under

the state board's guidelines, a commission would develop diversion programs, tap volunteers for in-custody and post-release support, propose grievance procedures, choose in-residence and "circuit-riding" ombudsmen, contract with legal services and arbitrators, and assign field teams to periodically investigate confinement institutions within the area. Universities and institutes, located within the various regions, could serve as a research and skills pool of students and other professionals. Reports would be published annually and available in regional libraries. Such reports, along with the other commission activities, would provide the kind of informed visibility needed by the diverse publics to be aware of and supportive of meaningful change.

The reports could furnish a baseline of continuing information, and the varied monitoring activities could focus a necessary spotlight upon administration in places of confinement.

Background, Goals, and Prior Efforts

Before considering the proposal, it is necessary to get an understanding of first, the diverse goals of involuntary custody; second, present conditions found within the institutions; third, recent efforts to use diversion and community treatment; fourth, the notion of visibility and its implications; fifth, existing legal rights and remedies; sixth, the needs of the individual confined; and seventh, the range of remedies available.

The Diverse Goals of Involuntary Custody

Three values must be given their due weights in seeking reasoned approaches both in diversion programs and in confinement environments: the interest in societal protection, the interest in humane treatment and development to equip an individual to better function in his home community, and the interest in freedom of choice. These are the legitimate concerns of a democratic society.

Seymour Halleck, professor of psychiatry at the University of Wisconsin, in referring to the need for prison reform, spoke about a community's concern for assuring freedom:

. . . [One] goal of any humane and compassionate society is to keep as many citizens as possible as free as possible. A community that is committed to a belief in the worth of each individual cannot banish a citizen, disenfranchise him, or cage him without hurting itself.²

² Halleck, *testimony in Hearings on Corrections, Part IV, Prisons, Prison Reform and Prisoners' Rights, House Committee on the Judiciary*, 92nd Cong., 1st Sess., at 42 (1971).

Confinement necessarily involves a substantial restriction upon individual freedom. Such restraint is justifiable, if there is sufficient reason to invoke concern about the other societal interests: treatment and care, and protection.

The basic purpose of involuntary custody in a mental institution is therapeutic treatment. The mentally ill person is to be helped to develop or regain his full capacities so that he may be released to function within his community, without harm to himself or others.³ As the risk of danger to himself or others diminishes, the legitimacy of his confinement is undermined.⁴ Clearly inappropriate, of course, are goals of punishment in this confinement context.

Likewise, jails or detention centers housing individuals pending determination of criminal guilt or innocence, cannot properly seek to punish inmates. Nor, for that matter, can such institutions engaged in enforced rehabilitation. The sole purpose of detaining such persons, according to most authorities, is to assure their presence at court proceedings.⁵

Juvenile institutions operate upon the theory of *parens patriae*; i.e., that the state has responsibility for guiding and developing its young,⁶ especially in the absence of appropriate parental or community models. At the same time, the institution recognizes an obligation to protect the society. But there is no legitimacy given to notions of punishment or retribution.

In the adult correctional context, however, society seems to give conflicting signals to its administrators: provide punishment, yet also offer an opportunity for rehabilitation. Such an approach is foolhardy. Professor Halleck observes that "there is no scientific way to evaluate"⁷ the effect of punishment as a deterrent. And most important, he warns that "it is our blind adherence to the value of punishment which precludes a rational system of community protection."⁸

The interest in societal protection, rather than a commitment to punishment, is now the accepted value in adult corrections. The Ohio Citizens' Task Force on Corrections declared in 1971:

³ *Wyatt v. Stickney*, 325 F.Supp. 781, 784 (M.D. Ala. 1971).

⁴ Although, some states permit involuntary hospitalization because the individual is in "need of treatment" despite the absence of danger. ENNIS & SIEGEL, *supra* note 1, at 24.

⁵ *Jones v. Wittenberg*, 323 F.Supp. 93, 100 (N.D. Ohio 1971); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION, *supra* note 1, at 326.

⁶ *In re Gault*, 387 U.S. 1, 16 (1967); see Note, *Right to Treatment for Juveniles?*, 1973 WASH.U.LAW Q. 157.

⁷ Halleck, *supra* note 2, at 43.

⁸ *Id.* at 45.

A correctional system should provide maximum feasible protection against violence, invasion of property rights, and all other kinds of lawlessness. The entire program of the system should be aimed toward that single objective.⁹

The task force report stressed that to achieve that goal, through rehabilitating the offender, notions of human dignity, justice, and democratic responsibility must be emphasized.¹⁰

Present Conditions in Places of Confinement

Beyond doubt, there are countless dedicated administrators and staffs in the nation's mental institutions, jails, juvenile facilities, and prisons. Of course, particular programs have been meaningful for some of the inmates or residents. Yet, in the main, the record discloses that the society's legitimate goals have been subverted. There does not seem to be dispute about the widespread failures and the dismal conditions. But there are diverse and conflicting theories surrounding their causes. Many lay the blame upon public apathy, inadequate budgets, inability to attract and retain competent staffs, and the failures in the judicial process or other community institutions.

Others contend that large, closed confinement institutions, by their inherent nature, will produce such results. In such places:

. . . power [is] concentrated in the hands of a few being exercised in an authoritarian manner; decisions [are] of a low-visibility nature; security considerations become too important.¹²

The . . . term that best describes [them] is *evil*. . . .¹³

Fred Speaker, then director, Division of Legal Services, Office of Economic Opportunity, explained to a congressional committee:

. . . [The] very nature of traditional custody is dehumanizing and anti-individual. Prisoners are numbers and virtually all decisions that are made are made by custodians instead of the individual. The almost inevitable result is that we have the creation of a robot, unprogrammed and unprepared to meet daily challenges of the street.¹⁴

⁹ OHIO CITIZENS TASK FORCE ON CORRECTIONS, FINAL REPORT to Hon. John J. Gilligan, Governor (Columbus, Ohio: Department of Urban Affairs, 1971), at A 3 [hereinafter cited as 1971 OHIO TASK FORCE].

¹⁰ *Id.* at A4.

¹¹ See, e.g., N.Y. Times, October 5, 1971, at 45, col. 6.

¹² Arthur E. Cohen, ACLU, citing to E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961), testifying in *Hearings on Constitutional Rights of the Mentally Ill, Before Subcommittee on Constitutional Rights, Senate Comm. on the Judiciary, 91st Cong., 1st Sess.*, at 214 (1969).

¹³ K. MENNINGER, THE CRIME OF PUNISHMENT at 72 (1968).

¹⁴ Speaker, *Hearings on Corrections, Prisoners' Representation, Subcomm. No. 3 of the House Committee on the Judiciary, 92nd Cong., 1st Sess.*, pt. 3, at 17 (1971), [hereinafter cited as *Hearings on Corrections*].

Some analysts of the problem emphasized a related element: the attitude of even the dedicated helper toward the resident. Declared Dr. David Vail, Minnesota's medical director:

[In] our theoretical work in Minnesota on the problem of dehumanization we reached the sad conclusion that much of what has taken place and is still taking place with regard to the mentally ill can be best explained by viewing what actually happens as based . . . on the assumption that mentally ill persons are less than or other than human . . . "humanoid," so to speak.¹⁵

Whatever the cause or causes, however, observers generally have been outraged at conditions. During his subcommittee's hearings on the constitutional rights of the mentally ill, in 1969, Senator Ervin recalled the "nationwide study that unfolded during those 1961 hearings" with findings that were "shocking and chilling."¹⁶ In 1972, Ira DeMent, U.S. Attorney in Montgomery, having entered the celebrated *Wyatt*¹⁷ case as amicus curiae, declared:

The things we found in the [Alabama mental institutions] are an outrage. There's neglect to the point that deaths have resulted. If I knew who to blame I'd prosecute the criminal. But you can't prosecute the system that has let such things happen in every state.¹⁸

In 1973, Ennis and Siegel warned, in *Rights of Mental Patients*, of the "enormous difference between the rights mental patients have in theory and . . . in practice."¹⁹

The nation's jails and juvenile detention facilities fared no better. Richard Velde, then associate administrator of the Law Enforcement Assistance Administration, described them as:

. . . without question, brutal, filthy cesspools of crime — institutions which serve to brutalize and embitter men to prevent them from returning to successful roles in society.²⁰

Juvenile treatment facilities have achieved no higher standard.²¹

¹⁵ *Hearings on Constitutional Rights of the Mentally Ill, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., pt. 3, at 214 (1969).

¹⁶ *Id.* at 2.

¹⁷ *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971) and 344 F.Supp. 373 (M.D. Ala. 1972); see also 334 F.Supp. 1341 (M.D. Ala. 1971) and 344 F.Supp. 387 (M.D. Ala. 1972).

¹⁸ N.Y. Times, March 26, 1972, at 35, col. 1.

¹⁹ ENNIS & SIEGEL, *supra* note 1, at 11.

²⁰ Quoted in Hughes, *The Correctional System: Designs for Reform—A Symposium; Sentencing and Corrections*, 11 AMER. CRIM. L. REV., 1, 6 (1972); see 1971 OHIO TASK FORCE wherein it "strongly recommends" that the Governor appoint task forces on juvenile and misdemeanor corrections (jails and workhouses), *supra* note 9, at v (covering letter of Dec. 15, 1971 from chairman Friedman to Governor Gilligan).

²¹ See *Hearings on Conditions in Juvenile and Youthful Offender Institutions, Before Subcomm. to Investigate Juvenile Delinquency, Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1970).

The then commissioner of the Massachusetts Department of Youth Services, Jerome Miller, stated in 1971:

. . . Until we can establish some level of humanity in this system we cannot really cull out what treatment modality works and it is dangerous to infuse such treatment modalities into such an outmoded repressive system.²²

Adult prisons, too, have failed to protect the community and have brutalized their inmates. In its final report, the Ohio Citizens' Task Force concluded that: "[At] present, corrections is a well-documented failure. Institutionalization *increases* rather than *decreases* crime."²³ The report explained:

Human beings cannot be placed in barbaric institutions subjected to a total deprivation of any semblance of dignity and respect, with any reasonable expectation that upon their release they will suddenly begin to conform their conduct to the requirements of the law and to act in a responsible fashion.²⁴

These views were echoed by Bagdikian and Dash, in *Shame of the Prisons*:

[Prisoners are] forced into programs of psychological destruction [If] they serve a sentence most of it will not be by decision of a judge acting under the Constitution but by a casual bureaucrat acting under no rules whatever; they will undergo a significant probability of forced homosexuality and they will emerge from this experience a greater threat to society than when they went in.²⁵

Even in so-called "model" correctional systems, individuals are "ingested" and "processed with little regard for their individual rights."²⁶

There seems a general consensus, then, in support of Chief Justice Burger's call for new non-warehousing approaches in corrections which will meaningfully rehabilitate rather than promote return to criminal activities.²⁷

²² Miller, *Hearings on Corrections, Prisons, Prisoners' Rights: Massachusetts, Before Subcommittee No. 3 of the House Committee on the Judiciary*, 92nd Cong., 1st Sess., pt. 5, at 21 (1971).

²³ OHIO TASK FORCE, *supra* note 9 at A29.

²⁴ *Id.* at A4.

²⁵ B. BAGDIKIAN & L. DASH, *SHAME OF PRISONS* 9 (1972), *quoted in* Hughes, *supra* note 20, at 1.

²⁶ *Hearings on Corrections, Prisons, Prison Reform and Prisoners' Rights Before the House Comm. on the Judiciary*, 92nd Cong., 1st Sess., pt. 4, at 23 (1971).

²⁷ See Burger, *Our Options Are Limited*, 18 VILL.L.REV. 165 (1972); *see also* N.Y. Times, Dec. 7, 1971 at 60, col. 6.

Recent Efforts to Use Diversion and Community-Treatment

The recorded failures of institutions of involuntary confinement have led to calls for "diversion"; i.e., keeping as many individuals out of the confinement systems as possible. Moreover, community treatment and rehabilitation facilities, closer to home, smaller in size, more open, and with substantially enlarged supportive services have been urged, to complement diversion efforts.

In a joint report, the National Association for Mental Health and the American Psychiatric Association endorsed the new community-based approach in the field of mental illness:

The winds of change are unmistakably blowing. If there can be sufficient Federal, state, and local funds marshalled to meet the attendant costs, it seems likely that a humane and socially useful approach to serving the mentally ill and enabling them to lead more productive lives in the community than has been possible before will be realized with the coming generation.²⁸

Drummond Ayres, Jr., observed the new phenomenon for the readership of the *New York Times*.²⁹ He noted that the present philosophy:

holds that the best way to help the mentally impaired move back toward normality is to treat them normally, that is, keep them out of cold, impersonal institutions and instead counsel them and mediate them in their own homes, or at least in clinics and hospitals in their own home towns.³⁰

Statistics told the story³¹ of this new trend. As recently as 1967, about half the 1,400,000 persons treated annually for mental illness were treated in state hospitals, each patient being kept an average of eight years. In 1972, with the help of community treatment programs, the number of persons treated annually rose to three million, but only a fifth of them, or 600,000, were treated in state mental hospitals. These hospitals kept patients an average of seventeen months. Sixteen years ago, one of every four mental patients was treated as an outpatient, and the other three were hospitalized, two in state facilities. But by 1972, two of every four were treated on an outpatient basis, and the other two were hospitalized, one in a state institution, and the other in a private, city, or federal hospital.

The Ohio Task Force on Ohio Commitment Procedures and Patients' Rights concurred in such efforts at diversion and com-

²⁸ N.Y. Times, July 30, 1972, at 28, col. 1.

²⁹ *Id.*; see, e.g., Cleveland Press, July 16, 1973, §A, at 10, col. 4.

³⁰ *Id.*

³¹ *Id.*

munity treatment. Its proposal, House Bill No. 984,³² would establish procedures to assure protection of confinee rights, adequate treatment employing the least restrictive community facilities appropriate, and the maximum use of voluntary hospitalization.

As in the field of mental health, the employment of diversion and community rehabilitation approaches is highly touted in corrections. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended the elimination of incarceration for those convicted of certain "victimless" crimes: marihuana possession, minor gambling, prostitution, and distribution of pornography.³³ Additionally, the Commission urged increased use of screening and diversion in other cases. *Screening* was defined as a decision by the authorities "not to bring any criminal charge or not to arrest a particular defendant."³⁴ *Diversion* was defined as the disposition of cases "by handling them in a noncriminal manner outside of the traditional court structure."³⁵ Richard Hughes, chairman of the ABA Commission on Correctional Facilities and Services, noted that diversion pilot projects had been undertaken, and observed that the approach was supported by the recent ABA Standards on Prosecution and Defense Functions.³⁶

Furthermore, in the case of individuals charged but not yet convicted, an earlier presidential task force had recommended programs to secure release before trial. The 1967 Presidential Commission on Law Enforcement and the Administration of Justice declared:

Although bail is recognized in the law solely as a method of insuring the defendant's appearance at trial, judges often use it as a way of keeping in jail persons they fear will commit crimes if released before trial. In addition to its being of dubious legality this procedure is ineffective in many instances

If a satisfactory solution could be found to the problem of the relatively small percentage of defendants who present a significant risk of flight or criminal conduct before trial, the Commission would be prepared to recommend that money bail be totally discarded.³⁷

³² 110th Ohio General Assembly, Regular Session, 1973-74.

³³ N.Y. Times, Jan. 15, 1973, at 1, col. 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Appendix to testimony of Richard J. Hughes, *supra* note 14, at 217.

³⁷ 1967 PRESIDENTIAL REPORT, *supra* note 1, at 326.

The Commission urged that bail projects be undertaken:

. . . at the State, county, and local levels to furnish judicial officers with sufficient information to permit the pretrial release without financial condition of all but the small proportion of defendants who present a high risk of flight or dangerous acts prior to trial.³⁸

In the area of juvenile corrections, Jerome Miller, former Massachusetts Youth Services commissioner, took the lead. Under his impetus, Massachusetts became the first state to close its large juvenile institutions and replace them with community-based work and educational programs, with juveniles confined in smaller facilities.³⁹ The 1973 National Advisory Commission supported that thrust, proposing that:

. . . no new major institutions for juveniles be built under any circumstances [and that existing ones] . . . be phased out in favor of local facilities and programs.⁴⁰

The 1973 Commission endorsed the philosophy behind the community-based rehabilitation approach, calling upon every state, within five years, to develop:

a systematic plan for implementing a range of alternatives to institutionalization with particular emphasis upon community-based alternatives to confinement.⁴¹

The Ohio Task Force on Corrections underscored that point:

Every conceivable alternative to imprisonment should be explored before any individual is committed to an institution.⁴² . . . *We must develop a system of community based alternatives to institutionalization: these are the most effective, fruitful, and realistic solutions to the proper handling of offenders.*⁴³ (emphasis in original)

The Task Force implored common pleas judges to sentence felons to local community-based facilities,⁴⁴ and recommended that sentences to state institutions be shorter,⁴⁵ with substantially less discretion in the parole board to continue confinement of an inmate after he becomes eligible for parole.⁴⁶

³⁸ *Id.* at 327.

³⁹ See N.Y. Times, Sept. 1, 1972, at 8, col. 1.

⁴⁰ N.Y. Times, Jan. 15, 1973, at 1, col. 1.

⁴¹ *Id.*

⁴² 1971 OHIO TASK FORCE, *supra* note 9 at A4.

⁴³ *Id.* at A9.

⁴⁴ *Id.* at A27.

⁴⁵ *Id.* at A3.

⁴⁶ *Id.* at A24-25. Burden of proof after minimum sentence should be upon Parole Board to show why the convict should not be released.

The Notion of Visibility and Its Implications

Assuring greater visibility to diversion approaches as well as to in-confinement administration is a crucial intermediate goal, if the ends of society are to be achieved. There are several reasons: first, the public must be made aware so that new approaches, where carefully designed, are adequately funded; second, external monitoring and employment of specialized independent skills (through legal services, ombudsmen, and periodic inspection) must be established to check the otherwise sweeping administrative control over those confined; third, judges and legislators — those charged with establishing facilities and committing individuals — must somehow better comprehend the realities of confinement; fourth, diverse lay groups (civic, church, employer, and community support organizations) must become involved in rehabilitation or treatment efforts both within the larger institutions and within the smaller, more open community facilities, for only when the lay community is supportive can meaningful change take place. At the same time, it must be recognized that haphazard publicity or unplanned monitoring bear substantial risks.

Public apathy or resistance has been a major handicap to reform. Richard Hughes, chairman of the ABA Commission on Correctional Facilities and Services, observed that reformers have been:

... faced with public apathy which has encouraged the slow breakdown of the corrections system and has counted with false economy the dollars available for probation and parole services.⁴⁷

New York's Director of Youth Services, Milton Luger, lamented that:

... correctional administrators have been starved, isolated, browbeaten and intimidated for so long that they do not know how to feel "entitled." They too often are ready to settle for hand-me-downs.⁴⁸

The mentally ill patient, likewise, has found the public apathetic. Senator Ervin observed that:

[h]ospitalized patients are not politically important; they are voiceless; they lack the large, heavily financed organizations to lobby for protection of their rights.⁴⁹

Given lack of public support, a new liberal release policy by the New York Department of Mental Hygiene had resulted in a horrible dilemma. An editorial in the *New York Times* decried the situation:

⁴⁷ Hughes, *supra* note 20, at 1-2.

⁴⁸ Luger, *What We Need Is Correctional Power and Pride*, 33 FED. PROBATION 3 (no.3, Sept. 1969).

⁴⁹ *Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate*, 91st Congress, 1st Sess., at 2 (1969-1970).

. . . [The] shocking lack of half-way houses [coupled with] an easy discharge policy turns out all too often to be a betrayal of people in dire need of care. . . . The answer is not a return to years of hopeless incarceration in institutions less noteworthy for treatment than for neglect They desperately need the structured environment of a half-way house, or better still a half-way community, [allowed] to come and go but assured at all times a haven where they can find at least a minimum of the help and concern they almost invariably need.⁵⁰

Public endorsement of half-way houses, especially for convicted felons, is mixed. A Louis Harris Poll revealed that 77% of those interviewed supported the idea, but only 50% declared that they would favor such programs in their own neighborhoods.⁵¹ Moreover, there is resistance to work-release projects as well. Such programs permit an inmate to spend time at some outside job or in a school during the day, with a return to confinement in the evenings or on weekends. Thirty-seven states are said to have work-release laws. But there is only minimal use of such programs. Indeed, Walter Busher, director of a national work-release study project of the Criminal Justice Institute in Sacramento, California, estimated that in 1971 only 5,000 inmates out of more than 200,000 are participating.⁵² About half of those involved were from four states: North Carolina, Florida, Maryland, and California. A substantial number of states with authority to grant work-release had fewer than three dozen men enrolled. Lodging and transportation posed difficulties. But public attitudes were crucial to the success of the program. North Carolina's Corrections Commissioner Bound declared that in his state:

people have always been accustomed to seeing prisoners working out of prison Our success was largely attributable to getting public support.⁵³

Public fears have substantially stalled community-based corrections. Legislators generally have been supported in efforts to build large institutions and provide manpower for security. But public approval for "frills" — rehabilitative, medical, vocational, and counselling services, has been hard to come by.

Correctional officials now call for greater frankness. One national assemblage of law enforcement officers meeting in Williamsburg, in 1971, acknowledged that: "[up] to now . . . the country's

⁵⁰ N.Y. Times, Feb. 7, 1973, at 38, col. 2.

⁵¹ N.Y. Times, Oct. 25, 1971, at 29, col. 1.

⁵² *Id.*

⁵³ *Id.*; *contra*, Cleveland Plain Dealer, Aug. 24, 1973, §C, at 1, col. 6.

corrections officials have not been honest with the public.⁵⁴ The conference recognized the need to be "frankly candid"⁵⁵ about the massive failures in order to expect any public sympathy or support.

Society, too often in the past, has taken the attitude, "out of sight, out of mind."⁵⁶ Yet the danger of abuse to individuals in custody in "hidden"⁵⁷ institutions cannot be overemphasized:

. . . [W]henver people are incarcerated, whether it be in a prison, an insane asylum, or an institution such as those for the senile and retarded, opportunity for human indignities and administrative insensitivity exists.⁵⁸

David Strand, attorney for the Cleveland Legal Aid Society, wrote of individuals committed to mental hospitals:

No people in the poverty community are more powerless or more isolated from legal services than those hospitalized in our public mental institutions . . . [Institutions] which theoretically exist to provide them with medical care and treatment . . . often serve the social function of warehousing and controlling persons exhibiting bothersome or bizarre behavior.⁵⁹

. . . The mental patient exists within a completely controlled situation, in which he is told when and where to sleep, eat, shower, defecate, and he is forced to follow directives from all staff members.⁶⁰

Moreover, given the far-flung network of facilities, even a department director may not know what is taking place within a particular institution. Jerome Miller, then commissioner of Youth Services in Massachusetts, with operating jurisdiction over eleven detention centers and training schools, testified that he found it difficult to know:

⁵⁴ N.Y. Times, Dec. 9, 1971, at 9, col. 1.

⁵⁵ *Id.*

⁵⁶ *Hearings Before Subcommittee No. 3, Committee on the Judiciary, U.S. House of Representatives on Corrections, Prisons, Prison Reform and Prisoners' Rights: Wisc.*, 92nd Cong., 1st Sess., pt. 4, at 58 (1971).

⁵⁷ N.Y. SENATE COMMITTEE ON CRIME AND CORRECTION, ANNUAL REPORT, HIDDEN SOCIETY, 1970 Session (1971).

⁵⁸ *Washington Post Co. v. Kleindienst*, 357 F.Supp. 770, 773 (D.D.C. 1972), *remanded on other grounds*, 477 F.2d 1168 (D.C. Cir. 1972).

⁵⁹ Strand, *Legal Aid for Patients in State Mental Institutions: The Cleveland Experience*, 6 CLEARING HOUSE REV., No. 8 at 483 (1972).

⁶⁰ *Id.* at 484.

. . . what is going on day to day in the institutions with reference to mistreatment and with reference to practices that I thought I had outlawed and find a year [or so later] still going on.⁶¹

The need, declared former Governor Richard Hughes, was to open up a channel to the outside. In that way, "a good deal of the other abuses and cruelties in our corrections system will be eliminated."⁶² He added: "Arbitrary power flourishes only when it is behind closed doors. If somebody is looking . . . the system can work."⁶³

Nonetheless, careful programming to achieve meaningful visibility should be contrasted with *undue publicity*. Fred Speaker, then head of the division of Legal Services, OEO, cautioned:

. . . [If] you give a lot of publicity to something . . . [it] will invite a reaction against it, and . . . it will end up being counterproductive

. . . [There] is a lot of pressure in these [correctional] institutions, totally compressed, and if you show a loosening, it can come out too fast. If you look like you are letting down all of the controls, it may disrupt the system so badly that you can't keep control [We] can't lose sight of the fact that there are people capable of serious crimes of violence, and so it is not unreasonable to attempt to retain some kind of control over them

The other consideration is false hope. If you give a lot of publicity, and that is why I tried to say in one phrase about the evil of rhetoric, the real danger that we have is that correctional reform becomes so popular that we will do a lot of talking about it, but not really deliver on the promises we make.⁶⁴

Another concern, certainly, is that efforts to assure greater visibility to in-custody administration risk exposing those confined to further loss of privacy.

The search, then, is for that right balance of lay and professional services as well as skilled external monitoring to ensure either less restrictive facilities or, at the least, confinement which seeks to further societal goals.

⁶¹ *Supra* note 22, at 17.

⁶² *Hearings on Corrections*, *supra* note 14, at 68.

⁶³ *Id.*

⁶⁴ *Id.* at 77.

Existing Legal Rights and Remedies

Public awareness of the massive failures of in-custody administration will no doubt play an important role in planning future directions. Yet devising meaningful diversion and community-based programs, while essential, should not cause us to overlook the needs of those presently confined. What are the legal rights and remedies of such individuals?

Traditionally, both the federal and state courts have had a "hands-off" policy toward in-custody administration. Judges felt disinclined to substitute their judgment for what they considered the superior knowledge of the psychiatrist, the mental institution director, or the prison warden. Nor did the courts wish to be emmeshed in the day-to-day operations of the confinement institutions. The courts, especially the federal courts, have slowly begun to erode that doctrine. Yet, as we shall see, legal remedies remain markedly deficient.

In theory, persons confined in mental institutions have broad constitutional rights. Speaking for the Supreme Court in *Jackson v. Indiana*,⁶⁵ Mr. Justice Blackmun declared that:

... due process requires that the nature and duration of confinement bear some reasonable relation to the purpose for which the individual is committed."⁶⁶

In that case, the Court held that indefinite commitment without notice or hearing violated due process. Ennis and Siegel, in *Right of Mental Patients*,⁶⁷ contend that a patient retains his full panoply of constitutional rights to due process, equal protection, free speech, religious freedom, and other protections of the bill of rights as well as the fourteenth amendment, unless the state can show a compelling need to restrict such exercise. Moreover, at least one circuit court⁶⁸ has held that an indigent has the constitutional right to court-appointed counsel during the commitment proceedings.

In the landmark case of *Wyatt v. Stickney*,⁶⁹ Judge Johnson ruled that there was a constitutional right to individualized treat-

⁶⁵ 406 U.S. 715 (1972).

⁶⁶ *Id.* at 738.

⁶⁷ B. ENNIS AND L. SIEGEL, *supra* note 1; See Symposium: *The Legal Rights of the Mentally Retarded*, 23 SYRACUSE L.REV. 991 (1972).

⁶⁸ *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968). In view of *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *In re Gault*, 387 U.S. 1 (1967) precedent and good sense support such a requirement even in civil commitment proceedings, especially considering the prospective patient's mental illness.

⁶⁹ *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971) and 344 F.Supp. 373 (M.D. Ala. 1972); see also 334 F.Supp. 1341 (M.D. Ala. 1971) and 344 F.Supp. 387 (M.D. Ala. 1972).

ment, employing the least drastic confinement necessary, and in accordance with minimum constitutional standards.⁷⁰ Furthermore,

... [the] failure to provide suitable and adequate treatment to the mentally ill cannot be justified by lack of staff or facilities [The] rights here asserted are . . . present rights . . . and, unless there is an overwhelming compelling reason, they are to be promptly fulfilled.⁷¹

Denial of such treatment to a confined individual violated his right to due process.⁷² Presumably, it constituted cruel and unusual punishment, as well.⁷³

Some judges consider scrutiny of confinement institutions a fundamental court responsibility. Chief Judge Bazelon of the District of Columbia Circuit Court, in speaking about correctional reform, declared:

What the court can do is take the time necessary to see to it that the other institutions are in fact doing what they are supposed to. This, I think, is the most important function of courts in a democratic society. They perform this function in two ways: First, by giving careful, intense attention to the particular situation before them; they can bring to light important problems that would otherwise be hidden simply because no one else had the time — or incentive — to look at the matter closely. Second, courts can see that the other institutions keep their promises. That is, by incessantly asking questions, courts can do a substantial amount to insure that the agencies which are supposed to be dealing with a particular problem are actually looking for answers, instead of simply taking action out of prejudice or ignorance.⁷⁴

In the mental institution setting, generally, doctors, hospital officials, and even judges frequently pay no attention to patients' rights, preferring instead to do what they believe to be in the patients' "best interests."⁷⁵

In addition, legal remedies to redress abuses are inadequate for several other reasons. First, although "very few patients or prospective patients can afford lawyers,"⁷⁶ assigned counsel are not made

⁷⁰ 344 F.Supp. 373, Appendix A, 379-86; and see *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

⁷¹ *Wyatt v. Stickney*, 325 F.Supp. 781, 784 (M.D. Ala. 1971).

⁷² *Id.*

⁷³ *Robinson v. California*, 370 U.S. 660 (1962) (detention based on addiction).

⁷⁴ Bazelon, Chief Judge, D.C. Cir., *A Probing Role for the Court*, N.Y. Times, Aug. 21, 1971, at 27, col. 2.

⁷⁵ ENNIS & SIEGEL, *supra* note 1, at 11.

⁷⁶ *Id.* at 40.

available automatically. Instead, while most states authorize⁷⁷ appointment, the burden, unlike the situation in criminal trials, is upon the prospective patient affirmatively to demand assignment of counsel.⁷⁸ Yet it is ludicrous to suppose that a hearing process can be fair in which one alleged to be mentally ill is left to fend for himself — whether during commitment proceedings, in subsequent applications for habeas corpus relief, or during periodic review under statutory mandate in which the lawfulness or conditions of confinement are at issue.

Second, the standards under which a person is committed are either absent, or poorly defined. Accordingly, when commitment for “treatment of a mental condition” or because one is “dangerous” is coupled with an absence of standards of treatment or identification of rights, the result further undermines the supposed constitutional protection.

Third, the judiciary, of course, is reluctant to assert any authority to compel the legislature to make needed appropriations.

Such factors tend to diminish the utility of the judicial remedy, especially when taken together with the general reluctance of the courts to get involved, the cumbersome court process, and the disinclination to consider applications seriously when not prepared by counsel.

Nonetheless, Judge Johnson’s use of his power in *Wyatt*⁷⁹ demonstrates the potential range of legal remedies available to a court that opts for an activist role. Judge Johnson announced an elaborate list of minimum constitutional standards,⁸⁰ enjoined the defendant Mental Health Board and officers from failing to implement such standards fully and with dispatch, retained jurisdiction of the case, reserved a ruling upon whether a master should be appointed, and established human rights committees to oversee the implementation of his order.⁸¹ But even Judge Johnson declined to challenge the legislature directly. He denied a motion to add various state officers as parties. Presumably, the motion had been made to force the legislature to divert moneys from “nonessential” services to the area of mental health, the latter having been declared by the Alabama legislature to be an “essential state function.”⁸²

⁷⁷ *Id.*

⁷⁸ *Id.* at 41.

⁷⁹ *Wyatt v. Stickney*, 344 F.Supp. 373 (M.D. Ala. 1972).

⁸⁰ *Id.*

⁸¹ 344 F.Supp. 373, 376 (M.D. Ala. 1971).

⁸² S. KRANTZ, *THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS — CASES AND MATERIALS* 818 (1973).

As in the case of mental patients, others in custody against their will have woefully deficient legal remedies to redress their constitutional and legal rights.

We had observed, earlier, that the pre-trial detainee is confined solely to assure his presence at trial.⁶³ There is no absolute right to bail or release on one's own recognizance, under the United States Constitution. Even if the eighth amendment's prohibition against excessive bail restricts states, by selective incorporation into the fourteenth amendment,⁶⁴ appellate courts have hesitated to intrude into the area of the judge's wide discretion in setting bail. Moreover, an indigent's inability to raise bail does not violate either the equal protection clause of the fourteenth amendment or the due process clause of the fifth or fourteenth amendments.⁶⁵ While in custody, however, the pre-trial detainee cannot be subjected to punishment or "rehabilitation."⁶⁶

The juvenile in a youth commission facility is incarcerated to provide the kind of environment that the state deems reasonable for the youngster's development into a functioning and responsible adult.⁶⁷

Adult corrections "bring about the necessary withdrawal . . . of many privileges and rights, a retraction justified by the considerations underlying our penal system."⁶⁸ Nevertheless, where the complainant prisoner has satisfied a federal court that what is involved was deprivation of a fundamental right, grievous loss, wilful injury, or shocking or barbaric conditions, the "hands-off" doctrine has been rejected. Thus, in *Ex parte Hull*,⁶⁹ the Supreme Court held that there is a constitutional right to correspond with counsel, government officials, and the courts. In two recent decisions, the Court held that absent sufficient legal assistance from other sources, the services of a "jailhouse lawyer" could not be denied outright to a prisoner,⁷⁰ and that a state could be required to expand its prison law libraries.⁷¹ Moreover, several lower federal courts have tended to emphasize the *Coffin* position that a "prisoner retains all the rights of an ordinary

⁶³ *Jones v. Wittenberg*, 323 F.Supp. 93 (N.D. Ohio 1971).

⁶⁴ The U.S. Supreme Court has not reached the question, but two lower federal courts have assumed that it does. *Pilkinton v. Circuit Ct.*, 324 F.2d 45, 46 (8th Cir. 1963); *United States ex rel. Keating v. Bensinger*, 322 F.Supp. 784, 786 (N.D. Ill. 1971).

⁶⁵ *But see* *Bandy v. United States*, 364 U.S. 477 (1960); Foote, *The Coming Constitutional Crisis in Bail II*, 113 UOF PA. LAW REV. 1125, 1180 (1965).

⁶⁶ *Jones v. Wittenberg*, 323 F.Supp. 93 (N.D. Ohio 1971); *see* *Hamilton v. Love*, 328 F.Supp. 1182, 1191 (E.D. Ark. 1971); *Tyler v. Ciccone*, 299 F.Supp. 684 (N.D. Mo. 1969).

⁶⁷ *In re Gault*, 387 U.S. 1 (1967).

⁶⁸ *Price v. Johnston*, 334 U.S. 266, 285 (1948).

⁶⁹ *Ex parte Hull*, 312 U.S. 546 (1941), *rehearing denied*, 312 U.S. 716 (1941).

⁷⁰ *Johnson v. Avery*, 393 U.S. 483 (1969).

⁷¹ *Younger v. Gilmore*, 404 U.S. 15 (1971), *aff'g* 319 F.Supp. 105 (N.D. Cal. 1970).

citizen except those expressly or by necessary implication taken from him by law."⁹² Applying the "grievous loss" rationale of *Goldberg v. Kelly*,⁹³ these courts have restricted mail censorship,⁹⁴ censorship of publications,⁹⁵ interference with religious exercise,⁹⁶ and disciplinary punishments absent due process hearings.⁹⁷ And shocking abuses have been held to constitute unconstitutional cruel and unusual punishments. Thus, in *Holt v. Sarver*,⁹⁸ exposure to the notorious Arkansas open barracks system, in which trustee-inmates held sway, was held to constitute such a violation.

Sheldon Krantz, in his *Law of Corrections and Prisoners' Rights — Cases and Materials*⁹⁹ discusses the potential range of judicial remedies¹⁰⁰ enjoining administrative action;¹⁰¹ ordering improvements in institutional services;¹⁰² ordering a closing or a release;¹⁰³ ordering a release from solitary confinement, change from transferred status, or restoration of good time;¹⁰⁴ awarding damages;¹⁰⁵ and enforcing judicial orders through contempt or other means.¹⁰⁶

In general, of course, such judicial remedies, however imposing they may appear, cannot provide the basic means of achieving inmate redress. Several factors should be noted.

First, relief based upon constitutional violation requires a showing of substantial deprivation, not merely the *allegation* of such infringement, regardless of whether a complainant seeks the 1983¹⁰⁷

⁹² *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944).

⁹³ *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

⁹⁴ *Palmigiano v. Travisono*, 317 F.Supp. 776 (D.R.I. 1970).

⁹⁵ *Fortune Society v. McGinnis*, 319 F.Supp. 901 (S.D. N.Y. 1970).

⁹⁶ *Knuckles v. Prasse*, 302 F.Supp. 1036 (E.D. Pa. 1969).

⁹⁷ *Clutchette v. Procnier*, 328 F. Supp. 767 (N.D. Cal. 1971).

⁹⁸ *Holt v. Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970).

⁹⁹ KRANTZ, *supra* note 82.

¹⁰⁰ *Id.* at 795-874.

¹⁰¹ *Clutchette v. Procnier*, 328 F.Supp. 767 (N.D. Cal. 1971).

¹⁰² See, e.g., *Jones v. Wittenberg*, 330 F.Supp. 707 (N.D. Ohio 1971) (calling for reduction of jail population, adequate security, improved diet and medical care), *aff'd*, 465 F.2d 854 (6th Cir. 1972).

¹⁰³ See, e.g., *Inmates of Boys Training School v. Affleck*, 346 F.Supp. 1354 (D.R.I. 1972).

¹⁰⁴ *Smoake v. Fritz*, 320 F.Supp. 609 (S.D. N.Y. 1970).

¹⁰⁵ Federal statutory authority is lacking under 42 U.S.C. §1983 to reach state treasury; see, *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, and companion case, *Oswald v. Sostre*, *cert. denied*, 405 U.S. 978 (1971).

¹⁰⁶ See *Landman v. Royster*, 354 F.Supp. 1292 (E.D. Va. 1973) (even though failure to comply may not have been malicious, officer is not immune from civil contempt; \$25,000 fine is imposed upon individuals in this official capacity, jointly and severally, with imposition suspended on condition that they carry out such steps as are necessary to insure terms of injunction are met).

¹⁰⁷ 42 U.S.C. §1983.

route or habeas corpus. There remains a great reluctance, even by activist judges, to intervene in daily prison operations, absent such a showing.

Second, relief based upon state statutes generally is unavailable¹⁰⁸ given the absence of statutory standards of operation or delineation of prisoner rights that might afford a basis for state court redress.

Third, the courts do not give adequate attention to *pro se* complaints,¹⁰⁹ yet in view of the limited availability of free legal services, the bulk of prisoner communication with the courts is through their own or "jailhouse lawyer" efforts.

Fourth, for an individual threatened by physical abuse, or by desperate conditions of detention, the judicial process will be too little, too late.

Fifth, there are serious difficulties involved in gaining evidence from within the closed prison system.

Sixth, even if the courts rule in favor of the inmate, there is a real question as to whether compliance can be achieved, especially where it calls for meaningful change of administrative conduct of a continuing nature, or (by implication) requires legislative funding.

Seventh, litigation is time consuming, costly, and fosters a hostility between the parties that will discourage meaningful resolution of future complaints. This is so unless, of course, successful litigation of *selected* grievances is coupled with established administrative machinery for the bulk of prisoner complaints.

Finally, many complaints do not concern matters that are resolvable by the courts. Grievances about visitation privileges, job classifications, and/or medical treatment may cause anger and frustration if not attended to; but unless they involve substantial deprivations, they are not cognizable in the courts.

The Needs of the Individual Confined

Given the limitations of legal remedies standing alone, reformers have sought other means of redress for those confined against their wills.¹¹⁰ Before we consider those other approaches, it is important to get some sense of the range of problems and grievances of such individuals.

¹⁰⁸ See e.g., Bergson, *California Prisoners: Rights Without Remedies*, 25 STANFORD L.REV. 1 (Nov. 1972).

¹⁰⁹ See FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT at 14 (Freund Commission) (Washington, Admin. Office of U.S. Courts, 1972).

¹¹⁰ See KRANTZ, *supra* note 82, at 860-73.

The confined person's concerns, as *he* perceives them, include:
Civil matters

He may be hounded by creditors, an employer unwilling to wait, a wife who wants a divorce and child custody, or other family problems.

Medical treatment

He may be concerned that he is getting too little, too much, the wrong kind of, or incompetent attention.

Physical abuse, harrassment, discrimination

He may claim to be in fear of wilful injury, sexual assault, harrassment, or discrimination based upon race or culture at the hands of staff or fellow inmates.

Pursuing legal redress in getting out

He may complain that he was unlawfully confined or that present conditions or new evidence warrant his release. His concerns may include whether he can get a lawyer, whether his counsel is making timely motion or appeal, whether bail has been reduced, or whether bond has been arranged.

Transfer and classification

He may want a transfer to a facility closer to his family, or one with different programs. He may be troubled by his medical condition or job classification since these may bear directly upon the extent of his privileges or relative freedom within the institution.

Food, clothing, shelter

He may be aggrieved about denials of basic necessities or their inferior quality.

Sexual needs

Undoubtedly he will feel sex drives and be unable to resolve them.

Property complaints

He may feel that his private possessions are being stolen or wilfully damaged.

Mail and visits

He may wonder why no one is visiting, and/or why his mail does not arrive or is unfairly censored.

Physical exercise and recreation

He may have too much, too little, the wrong kind, and at the wrong time.

Communication with the outside

He may seek contact with outside groups; he may desire law books or other literature, or the aid of a "jailhouse lawyer."

Parole considerations, periodic review

The prison inmate wants to know when he will be eligible for parole. The confined mental patient similarly is anxious to learn when his case is due for periodic review — judicial or administrative; and both will be troubled about the unstated or ambiguous grounds for continued confinement.

Disciplinary actions

The incarcerated youth or adult offender may protest his innocence of the charges placed against him; he may complain about the lack of a fair hearing, or the severity of punishment — whether it be isolation, transfer to another facility, reclassification, or loss of privileges.

Privacy and personal hygiene

He may be concerned about overcrowded conditions, lack of respect for his human dignity, lack of items of personal hygiene — soap, toilet paper, etc.

Political or religious association

He may complain that his organization is treated unfairly, not given sufficient opportunity to meet, or not given proper facilities or equipment.

Work assignment, rehabilitation, wages, working conditions

He may be aggrieved that his assigned work does not comport with his treatment or rehabilitation program, or that it is preventing him from doing "his own time." He may complain about the few pennies earned in wages, or about the working conditions.

Grievance machinery

He may feel that there is no means available in the institution to redress a grievance. He may not know to whom he should complain. He may fear reprisal. He may view the facility resident or inmate councils as unrepresentative, ineffective, or pro-administration. He may consider an ombudsman as a lackey of the administration, agency inspection teams as bureaucratic and meaningless, and concerned citizens' task forces as helpless to achieve results in the face of the administrator's resistance.

The thirst to be free

The person's complaint may reflect his basic desire to be free to make his own decisions about his life. He may express, in turn, great despondency, and increased anger at his confinement. He may view himself as a political prisoner, a captive of cruel parents, or a sufferer of gross indignities, however justified he believes the original commitment to have been.

Some of the above concerns may be entirely justified, especially in view of the record of conditions in many places of confinement. Of course, many of the claims may be groundless, based upon misinformation, grounded upon desires in conflict with legitimate confinement goals, or simply intentionally concocted. Yet providing genuine mechanisms, effective in testing the legitimacy of such claims and perceived to be so, is an important ingredient in confinement reform. It will aid in achieving respect for confinement goals among those in custody. Such respect, in turn, will foster the process of development, rehabilitation, or treatment.

The Range of Remedies Available

Legal Services

Persons involuntarily in custody are in need of legal services and generally can not afford to hire an attorney. In the mental institution, we have noted the "enormous difference"¹¹¹ between the patient's rights in theory and in actuality, and his "isolation from legal services."¹¹² In one experimental program, the Legal Aid Society of Cleveland has set up offices *within* the four state mental hospitals serving the Greater Cleveland area. The program has the endorsement of the directors of the hospitals involved, on the assumption that such services, by resolving legal problems, will relieve the stresses that are hindrances to treatment. Staffing the project are three attorneys, three law students, and a graduate student in social work. Four categories of representation are indicated: individual representation in matters arising before or concurrently with hospitalization, individual representation in seeking discharge, law reform, and program development. Legal Aid attorney David Strand observes that staff support diminishes as concerns move from external matters (domestic strife, bankruptcy, threatened eviction) to challenges to staff operation itself. Yet he insists that his program is therapeutic because it provides otherwise dehumanized, institutionalized patients some opportunity to affect their own destiny.¹¹³

¹¹¹ ENNIS & SIEGEL, *supra* note 1, at 11.

¹¹² Strand, *supra* note 59.

¹¹³ *Id.*

Recognizing the need for legal services, the Ohio Citizens' Task Force on Commitment Procedures and Patients' Rights, in its draft proposal, House Bill No. 984,¹¹⁴ calls for the establishment of a Legal Advocacy Service which would channel free attorneys to indigent mental patients.

Moreover, the ABA Board of Governors in 1973 created the new ABA Commission on the Mentally Disabled. ABA President Chesterfield Smith declared:

This is an area of great need, and it is hoped that the legal profession will concentrate its efforts on action programs to help mentally disabled persons who sometimes have been overlooked in the past. This program is one of a series of new thrusts to make legal services available to all people.¹¹⁵

In corrections, legal services are as desperately needed. Supreme Court decisions assuring assignment of counsel¹¹⁶ at every critical stage of the criminal process do not purport to include collateral challenges to confinement, or assignment of attorneys for civil matters.

Congress has funded a fledgling program. But Fred Speaker, then director of the division for legal services, Office of Economic Opportunity, testified that his program is "seriously deficient in our Nation's jails and prisons."¹¹⁷ One major obstacle is the sheer size of the task assigned. A good legal services program in a medium sized prison could be required to handle over one thousand cases a year, with the vast majority dealing with administrative breakdowns.¹¹⁸ Speaker believes that there are "simply not enough lawyers" to handle the myriad of legal needs.¹¹⁹

. . . [T]he typical inmate [convicted felon] has perhaps greater need for legal assistance than his brother outside the prison walls. Virtually all types of civil cases involve inmates. . . . The whole question of parole, its issuance and its revocation, requires counsel if justice is to be done.

¹¹⁴ 110th Ohio General Assembly, Regular Session, 1973-74.

¹¹⁵ *Problems of Mentally Ill—Commission Created to Reform Deficiencies*, 18 AM. BAR ASS'N BAR NEWS, Vol. 7 at 2 (July 1973).

¹¹⁶ *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Mempa v. Rhay*, 389 U.S. 128 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963).

¹¹⁷ *Hearings on Corrections*, *supra* note 14, sec. 15, pt. 3, at 71.

¹¹⁸ Singer & Keating, *Prisoner Grievance Mechanisms: A Better Way than Violence, Litigation and Unlimited Administrative Discretion*, 19 CRIME AND DELINQUENCY 367 (July 1973).

¹¹⁹ *Hearings on Corrections*, *supra* note 14, at 72.

The matter of discipline within the institution requires new concepts of due process. Official actions involving religious freedom, censorship, visitation, segregation, and discrimination, punishment, all may require legal examination.

And of course, the very conditions of the prisons themselves, both physical and administrative, including overcrowding, substandard facilities, and the inadequate training or recreation, all require legal help.¹²⁰

The ABA Board of Governors in 1973 gave its support to pending legislation in Congress¹²¹ that would establish a national legal services corporation to carry on the Office of Economic Opportunity program being phased out.¹²² There was no assurance, however, that the corporation would provide expanded legal services to prisoners.

In Ohio, the Citizens' Task Force on Corrections urged that "a legal assistance program be implemented by the Division of Correction as soon as possible."¹²³ In an official response,¹²⁴ the new commissioner reported that the recommendation had been implemented. He noted that it is being directed by a professor of law "with the assistance of three full-time attorneys,¹²⁵ but the contract between Legal Aid and the newly established Department of Rehabilitation and Corrections *precludes* attorneys in the program from representing inmates in grievances *against* the department or any of its facilities.

Indentifiable Standards

Even if counsel is available, the absence of identifiable standards within statutes or administrative regulations is a major obstacle to judicial relief. Ennis and Siegel, in *Rights of Mental Patients*,¹²⁶ disclose that state laws use ambiguous terms such as "mental illness," and "treatment" without hedging them by strict burdens or delineations of rights and obligations. Recognizing these shortcomings, the American Bar Association Board of Governors announced that its new Commission on the Mentally Disabled would work to:

- (1) Sharpen statutory definitions of the types and degrees of mental illness which justify involuntary hospitalization.

¹²⁰ *Id.*

¹²¹ H.R. REP. NO. 7824, 93d Cong., 1st Sess. (1973).

¹²² *Board Supports Delivery of Legal Services*, 18 ABA BAR NEWS, no. 7, July, 1973, at 1, 10.

¹²³ 1971 OHIO TASK FORCE, *supra* note 9, at A20

¹²⁴ OHIO DEPARTMENT OF REHABILITATION AND CORRECTION (Bennett J. Cooper, Director; John J. Gilligan, Governor), RESPONSE TO THE REPORT OF THE TASK FORCE ON CORRECTIONS 59 (Feb. 1, 1973) [hereinafter cited as RESPONSE].

¹²⁵ *Id.*

¹²⁶ See ENNIS & SIEGEL, *supra* note 1, at 34.

(2) Establish proper procedures for classifying, hospitalizing and discharging individuals to protect their rights to notice and representation by counsel.

(3) Protect the individual's right to retain control of his personal and business affairs when this is not detrimental to the individual or to the public.

(4) Resolve the legal issues involved in controversial modes of treatment, such as chemotherapy, psychosurgery, and electroshock therapy.¹²⁷

In a far-reaching proposal, the Ohio Citizens' Task Force on Commitment Procedures and Patients' Rights, in its House Bill No. 984,¹²⁸ seeks to establish both statutory delineation of rights and effective procedures to assure compliance. Rights declared include notice; access to counsel; dignified treatment and respect for privacy; protection from assault; access to visitors; free communication; access to reading materials without censorship; storage space; retention of all civil rights and of professional and vehicular licenses; right to marry, sue, obtain a divorce, register to vote, religious worship; right to least restrictive treatment; freedom from isolation; freedom from unnecessary or excessive medication; right to obtain current information regarding the treatment plan; right to consult with independent specialists; and right to refuse to perform labor relating to hospital maintenance. Limitations upon these rights are allowed only upon a showing of clear and present danger to hospital patient or staff, of incompetence to handle business affairs (adjudged in a separate judicial proceeding), or a great danger to patient health. Involuntary commitment requires showing of substantial risk of physical harm, physical impairment or injury, or need of treatment for mental illness as manifested by evidence of behavior that disables the confined or others, from living a socially viable life. Proof beyond a reasonable doubt is required in a mandatory hearing within approximately two weeks of commitment. If a judge is satisfied that the burden has been met by the state, he can commit only for a period of ninety days; at that time, a second mandatory hearing is required. After that point, hearings are to be had every two years, and if the state cannot meet its burden, the patient is automatically released. A key element in the bill is the establishment of a Legal Advocacy Service with three basic responsibilities: to inform patients of their legal rights, to assure that individuals have the assistance of counsel, and to receive and investigate patient grievances.

¹²⁷ *Problems of Mentally Ill — Commission Created to Reform Deficiencies*, 18 ABA NEWS, no. 7, at 2 (July 1973).

¹²⁸ 110th Ohio General Assembly, Regular Session, 1973-74.

There is similar need for defining confinee rights and administrative responsibilities and standards¹²⁹ by state statute, in the correctional setting. Krantz, in his *Law of Corrections and Prisoners' Rights*, declares that then:

. . . state courts and the executive and legislative branches would all have a more appropriate basis for judging the quality and deficiencies of prison facilities, procedures and programs as well as the appropriateness of prisoner complaints

For example, state legislation might specify procedural requirements for disciplinary hearings and administrative transfers.¹³⁰

He cautioned that legislative specification is meaningless unless all the branches of government have the means to enforce compliance.¹³¹

Krantz notes that the 1973 Advisory Commission on Criminal Standards and Goals proposed two standards relating to safety and health,¹³² as well as to inspection procedures.¹³³ Moreover, the ABA Commission on Correctional Facilities and Services has tried to assist states in promulgating new statutory requirements for local jails.¹³⁴

In addition, proposals have been made to enact minimum *federal* statutory standards for the treatment of prisoners. House Bill 14327¹³⁵ proceeded upon the theory that such legislation would be "appropriate" in enforcing fourteenth amendment guarantees.¹³⁶ Clearly, Congress

¹²⁹ *Hearings on Corrections*, *supra* note 14, at 81: "There are neither statutory nor administrative standards available to regulate the broad discretion of administrators over people under correctional supervision"; See *Standard Minimum Rules for the Treatment of Prisoners*, 4th U.N. Congress on Prevention of Crime and Treatment of Offenders, 1955, in ABA COMMISSION ON CORRECTION FACILITIES AND SERVICES AND COUNCIL ON STATE GOVERNMENTS, COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS (Aug. 1972), part IV; see Draft: Minimum Standards of Civil and Human Rights for Inmates in Correctional Institutions (prepared by Donald H. Goff for U.S. Commission on Civil Rights, May 9, 1973) (unpublished paper) which states: "The Enclosed Prepared as a Draft Working Document for the U.S. Commission on Civil Rights Represents a Proposed Baseline for Minimum Standards of Civil Rights and Human Rights of Inmates in Correctional Institutions as well as standards for institutional practices in areas affecting these rights."

¹³⁰ KRANTZ, *supra* note 82, at 866.

¹³¹ *Id.*

¹³² *Id.* at 865 (Standard 2.5, "Healthful Surroundings").

¹³³ *Id.* (Standard 9.3, "State Inspection of Local Facilities").

¹³⁴ ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, SURVEY AND HANDBOOK ON STATE STANDARDS AND INSPECTION LEGISLATION FOR JAILS AND JUVENILE DETENTION FACILITIES, (2d Ed., March 1973).

¹³⁵ H.R. REP. NO. 14327, 92nd Cong., 2d Sess. (1972).

¹³⁶ See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); federal regulation would preempt conflicting or less stringent state standards, *Hines v. Davidowitz*, 312 U.S. 52 (1941).

could impose minimum standards as a condition upon federal grants to state and local correctional agencies.¹³⁷

Promulgation of administrative regulations has also been recommended to provide systematic and clearly-defined administrative procedures within institutions of confinement. The 1973 Advisory Commission standard 2.9 states:

Each correctional agency should immediately develop and implement policies, procedures, and practices to fulfill the right of offenders to rehabilitation programs.¹³⁸

California¹³⁹ and Massachusetts¹⁴⁰ require that their respective state boards of corrections establish minimum standards for the county correctional facilities. Similarly, Ohio House Bill No. 587¹⁴¹ would authorize the Director of Rehabilitation and Correction to make and administer standards of security, sanitation, and prisoner treatment in local jails and county institutions.¹⁴²

The Ohio Citizens' Task Force, in 1971, called for the then Division of Corrections to promulgate:

... A division-wide set of rules of conduct clearly specifying all offenses and punishments and distributed to all institutional personnel and inmates . . .¹⁴³

... policies and guidelines for institutional rules and regulations, and [to] review all present rules and procedures to insure that the demands of security do not negate the objectives of treatment.¹⁴⁴

The Division was urged to establish:

... policies and guidelines for institutional rules and regulations dealing with racial issues, provide for periodic review of institutional compliance with those guidelines and policies, and take swift action against any institutional infraction.¹⁴⁵

¹³⁷ See *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937); presumably the commerce clause, giving Congress plenary power to regulate matters that adversely affect national commerce, could be invoked as well: *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964).

¹³⁸ KRANTZ, *supra* note 82, at 872.

¹³⁹ CAL. PENAL CODE §6030 (West Supp. 1972).

¹⁴⁰ MASS. GEN. LAWS ANN. §127:1A (1972).

¹⁴¹ 110th Ohio General Assembly, Regular Session, 1973-74.

¹⁴² Rule-making authority might conflict with that already given the Court of Common Pleas. OHIO REV. CODE ANN. §341.06 (Page 1972) and §341.08 (Page 1972); it might also conflict with the authority of a nonchartered municipality to regulate its own jails, OHIO REV. CODE ANN. §715.16 (Page 1954).

¹⁴³ 1971 OHIO TASK FORCE, *supra* note 9, at A20.

¹⁴⁴ *Id.* at A22.

¹⁴⁵ *Id.* at A10.

The official response of Director Cooper, in 1973, disclosed that:

[the] Department . . . has issued administrative regulations dealing with institutional rules, rules of conduct, rules of procedure, procedure before the rules infraction board, felonious conduct, prehearing detention, investigation of rules infraction and a grievance procedure for inmates.¹⁴⁶

But the Task Force was not successful in its effort to have parole board procedures revamped. The Task Force had proposed that:

. . . [the] Parole Board should establish and publish guidelines defining what will constitute cause for continuance.

* * *

An inmate should be released at the expiration of his minimum term in the absence of compelling reason to the contrary. There is *no* evidence that longer incarceration improves an inmate's chances for community success; there is abundant evidence that it does not. The burden of proof, after the minimum sentence has expired, should be upon the Parole Board to show why he should not be released.

* * *

Parole Board hearings should be subject to the Administrative Procedure Act, which provides for review and appeal.¹⁴⁷

Grievance Procedures

Statutory and administrative promulgation of minimum standards cannot be effective without meaningful grievance procedures to complement judicial avenues of redress. This is equally true in the mental institution setting as well as in the correctional area.

As we have seen, mental patients may well have legitimate grievances. Such patients, in overwhelming proportion, are not "insane," but suffering from a wide range of illness, addiction, bizarre activity, and retardation. Aside perhaps from the severely retarded, the patently dangerous, and the totally schizophrenic, the typical patient should be encouraged to communicate his concerns. It is interesting to note that a valuable member of the human rights committee for Searcy Hospital was a patient of the facility at the time, according to chairman McCafferty.¹⁴⁸ The supposed adverse effect upon a patient's condition caused by providing access to skilled inter-

¹⁴⁶ RESPONSE, *supra* note 124, at 60; and appended admin. regs. nos. 804, 804a, 805, 805a, 806, 807, 808.

¹⁴⁷ 1971 OHIO TASK FORCE, *supra* note 9, at A24-25.

¹⁴⁸ *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971) and 344 F.Supp. 373 (M.D. Ala. 1972).

viewers, legal service attorneys, or ombudsmen, must be balanced against the therapeutic benefit of encouraging responsible exercise of rights and the discovery of arbitrary and harmful practices.

Most correctional authorities agree that grievance procedures are essential. Chief Justice Burger declared:

[Every] penal institution must have the means [whereby] complaints reach decision-making sources through established channels so that the valid grievances can be remedied and spurious grievances exposed.¹⁴⁹

The report of the National Advisory Commission recommended administrative procedures "allowing an offender to seek redress where he believes his rights have been or are about to be violated."¹⁵⁰ Linda Singer and Michael Keating of the Center for Correctional Justice, funded by OEO to develop effective grievance mechanisms, concur in their value:

From the different perspectives of the prisoner, the warden, and the judge, all would seem to have much to gain from mechanisms that are faster, less costly, and less painful than reform by prison rebellion or judicial decree.¹⁵¹

Interestingly, in a study of attitudes of inmates and staff at Concord prison in Massachusetts in 1973, the results showed that:

[o]ver 90% of the residents and staff members agreed that "it would be good to have a normal, orderly system by which residents could complain about things at Concord that are bothering them" and "the residents should get an official response to their complaints," or at least "most of them."¹⁵²

That study also revealed the widely differing perceptions of resident and staff regarding the availability of such procedures and the legitimacy of lodging complaints:

[O]nly 4% of the inmates, as contrasted with 63% of the staff, said these inmates had "always" or "usually" been able to find answers to their complaints. "Ten percent of the staff and 76% of the inmates say that staff look on inmates who complain about the institution to correctional staff and the superintendent as troublemakers."¹⁵³

¹⁴⁹ Warren E. Burger, Address to National Conference of Christians and Jews, Philadelphia, Pa., Nov. 16, 1972, *quoted in* Singer & Keating, *supra* note 118.

¹⁵⁰ Standard 2.18 *quoted in* KRANTZ, *supra* note 82, at 872.

¹⁵¹ Singer & Keating, *supra* note 118.

¹⁵² Virginia McArthur, Resolution of Inmate Grievances at a Massachusetts Prison, Center for Correctional Justice, (unpublished paper, April 1973), at 7 [available from the author, or from the Cleveland State Law Review].

¹⁵³ *Id.*

But the Chief Justice observed that prisoners who do not complain "are often the truly lost souls who have surrendered and cannot be restored."¹⁵⁴ The then commissioner of Massachusetts Youth Services, Jerome Miller, observed that: ". . . [the] better adjusted prisoner to the system was the least likely to make it on the street, and the agitator was the most likely."¹⁵⁵

Increasingly, elaborate grievance procedures are being established. Maryland created an "Inmate Grievance Commission" appointed by the governor. Under this procedure, any state prisoner may complain to the commission. Unless the complaint is clearly without merit, a hearing is afforded at which the prisoner is heard and may be represented by retained counsel. A commission order upholding the complainant is reviewable by the Secretary of the Public Safety and Correctional Services.¹⁵⁶ Singer and Keating are skeptical about the value of the commission because of the criticisms of it by its first executive director and the apparent unwillingness of prisoners and administrators alike to use it in periods of turmoil.¹⁵⁷ The authors note that Illinois, Kansas, and Wisconsin also have developed grievance procedures. These call for written complaints, written responses, and reviews at various administrative staff levels, with ultimate reply by the respective commissioners within a specified time.¹⁵⁸

One typical element of the new administrative grievance structure in corrections is the inmate advisory council. In his official response to the Ohio Task Force, Director Cooper expressed his strong support:

This recommendation¹⁵⁹ has been implemented by the creation of resident councils at the institutions. It is our opinion that the councils can be an effective means of communication between residents and staff and create an atmosphere where problems can be openly discussed.¹⁶⁰

Such resident councils were to be chosen by secret ballot, to serve in a purely advisory capacity, with no authority to establish or administer policy. Their term of office was six months with successive terms

¹⁵⁴ *Hearings on Corrections*, *supra* note 14, at 2.

¹⁵⁵ Miller, *Hearings on Corrections*, *supra* note 22, at 23.

¹⁵⁶ Singer & Keating, *supra* note 118.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 1971 OHIO TASK FORCE, *supra* note 9, at A15

¹⁶⁰ RESPONSE, *supra* note 124 at 32, and appended admin. reg. 846; concurrence by Joseph Higgins, Acting Commissioner, Mass. Dept. of Corrections, *supra* note 22, at 57.

prohibited. Councils could not represent individuals in grievances against the administration without the prior approval of the warden. Authority was reserved to remove a member from office.¹⁶¹

Singer and Keating argue that such councils "lack credibility among governed inmates."¹⁶² There are certain problems: the concept of representation in a closed society "frequently does little more than formalize the rule of aggressive inmates;"¹⁶³ there is a tendency for administrators to disband the council if it asserts itself; there is a fear by inmates that a change in administration will end the "experiment"; the councils may be misused to channel favors to cooperating inmates or may be given policy responsibilities which make them weapons of the administration.¹⁶⁴

Lack of inmate advisory council credibility among some activist prisoners has led to the development of prisoner unions. These have been organized without official approval in Folsom Prison in California, Greenhaven in New York, Lorton Prison in Washington, D. C., and Lucasville Prison in Lucasville, Ohio. Organizers maintain that such unions can provide a needed *consumer* perspective. They contend that while the need for drastic reform is patent, changes have been trivial, and the pace glacial. Unions, some reformers argue, would make a major difference: they would provide a structure open to all prisoners and ex-prisoners alike, fostering tolerances across heretofore tense racial and ethnic lines; they would provide a way to formulate proposals with due deliberation, rather than hastily drawn up "demands" during periods of high tension; and they would provide a potent weapon for non-violent change through the threat of work stoppage. It remains unclear whether the unions will focus upon traditional labor issues or will concern themselves with the gamut of correctional reform. In any event, a concerted effort is going to be made to gain support from the traditional union movement.¹⁶⁵

Opponents of the development of prisoner unions reject the view that such organizations can have any legitimate role.¹⁶⁶ According to them, such a development can only result in increasing and magnifying the tensions within prisons, and thus produce ugly confrontations. Challenge to authority or instances of physical resistance can only be met by greater state force. Furthermore, such opponents

¹⁶¹ *Id.*

¹⁶² Singer & Keating, *supra* note 118.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ ACLU FOUNDATION, NATIONAL PRISON PROJECT, 1424 16th St. N.W., Wash., D.C. 20036, "Prisoners Union Organizing Committee Proposal." (undated, unpublished).

¹⁶⁶ See, e.g., Cleveland Plain Dealer, Aug. 15, 1973, at 11A, col. 4.

are skeptical about the capacity or willingness of union leaders to concern themselves with particular grievances of individual inmates.

Ombudsman

The closed society of these institutions resists conformity to system-wide regulations. Notwithstanding the development of grievance procedures and inmate advisory councils, most students of the problem believe that mechanisms *external* to the confinement administrations must be established. The Ombudsman, a device long respected in Scandinavia to provide redress to citizens against a faceless bureaucracy, has been transported across the Atlantic to do service in the correctional and mental illness settings.

Richard Bacon, Executive Director of the Pennsylvania Prison Society, described to Congressmen the traditional functions of an ombudsman:

[He is an] independent, high-level officer who receives complaints, who . . . inquires into the matters involved . . . and . . . makes recommendations for suitable action. He may also investigate on his own motion. He makes periodic reports. His remedial weapons are persuasion, criticism, and publicity. He cannot, as a matter of law, reverse administrative action.¹⁶⁷

Congressman Badillo explained the need for such an office, using the case example of the Attica prison setting:

[The prisoners] had no recourse against [prison abuses] because they did not have access to legal aid, or if they did have access to legal aid, the process of getting the remedies brought about would just take so long that it would extend far beyond the prison terms and would only cover those individuals that brought a law suit.¹⁶⁸

And the Freund Commission recommended creating such an office both to provide meaningful resolution of prisoner grievances and to relieve the courts of the current avalanche of *in forma pauperis* petitions:

. . . It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge, and ultimately by the Supreme Court of the United States. But we are, in truth, fostering

¹⁶⁷ *Hearings on Corrections*, *supra* note 14, at 31; on the ombudsman concept generally, see W. Gellhorn, *WHEN AMERICANS COMPLAIN: GOVERNMENT GRIEVANCE PROCEDURES*, Cambridge: Harv.U.Press, 19____; Tibbles, *Ombudsman for American Prisons*, 48 N.D. L. REV. 383 (1972); T. Fitzharris, *THE DESIRABILITY OF A CORRECTIONAL OMBUDSMAN*, (Berkeley: Univ. of Calif. 1973).

¹⁶⁸ *Hearings on Corrections*, *supra* note 14, at 5.

an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk. The question is, would it not be better to substitute for the edifying symbol, and the illusion that it presents, the reality of actual, initial consideration by a non-judicial federal institution charged exclusively with the task of investigating and assessing prisoner complaints of the denial of federal constitutional rights. This institution, headed by an official of high rank, would have a staff of lawyers and investigators, and a measure of subpoena and visitatorial powers. It would be charged to investigate complaints, make a response to them, and where possible, try to settle in-prison grievances by mediation.

All petitions for collateral review or for redress of grievances concerning prison conditions, from state or federal prisoners, which could now be filed in a federal court, would go initially to this new institution at the election of the prisoner or by referral to it at the discretion of the court in which a petition is filed. Three months might be allowed the new service for dealing with a complaint or petition lodged originally with it. At the end of this period the prisoner could file his papers with an appropriate court, but the papers would be accompanied by a report from the new institution. Thereafter, the matter would proceed as it would now.¹⁶⁹

While the ombudsman concept has received favorable comment from correctional officers¹⁷⁰ and reformers,¹⁷¹ different models have been put forward. Richard Hughes, chairman of the ABA Commission on Correctional Facilities and Services considered the ombudsman device as a "range of approaches to amicable resolution, not fire power resolution . . ."¹⁷² Congressman Badillo expressed the view that an ombudsman should be in residence:

. . . 24 hours a day, 7 days a week . . . to see to it that the newspapers are delivered, whether religious services are permitted, whether the diet is adequate and you can't do it

¹⁶⁹ See FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (Freund Commission) (Wash: Admin. Office of the U.S. Courts, Dec. 1972) at 14.

¹⁷⁰ See RESPONSE, *supra* note 124, at 6; *Hearings on Corrections*, *supra* note 14, at 22.

¹⁷¹ *But see* Singer & Keating, *supra* note 118, who support better designed grievance machinery and third party arbitrators as a more effective substitute for ombudsmen, the latter viewed as generally dependent upon correctional directors and unable to achieve compliance except upon minor matters. *See also* Coulson, *Justice Behind Bars: Time to Arbitrate*, 56 A.B.A.J. 612 (1973).

¹⁷² *Hearings on Corrections*, *supra* note 14, at 65.

if somebody who is appointed sits in Washington or Albany and delegates minor functionaries to visit the prisons from time to time.¹⁷³

Hughes envisioned a possibly different arrangement:

Supposing that we know that each week or at some short interval, a group of decent people, ombudsmen, including some lawyers, would be visiting these institutions, would have complete access to any complaints or prisoners, would see a list of those segregated in solitary confinement . . . that would open the window. That, I think, would establish if carried out in cooperation with the correctional establishment and if it had the propulsion of some kind of legislation, this right to access of the outside.¹⁷⁴

They agreed that the ombudsman model would have to be structured as a multi-racial committee. Congressman Badillo observed that a single individual would lack credibility: ". . . If black, he won't get the support of the white guards. . . . If . . . white . . . he is not going to have credibility with the black prisoners."¹⁷⁵

A major source of disagreement among correctional administrators and students of corrections concerns the degree to which the ombudsman, whatever the design, should be independent of the correctional administration. Penal administrators contend that however competent and highly motivated, an independent ombudsman could well undercut legitimate correctional administration. Some reformers reply that only an ombudsman not dependent upon a director for tenure or salary can expect to have credibility among inmates.

Several states have now embarked upon the ombudsman experiment, although it is too early to determine the efficacy of the concept. In 1967, Hawaii established a state-wide office of ombudsman,¹⁷⁶ to whom any citizen feeling aggrieved by the actions of a state agency (not only within correctional administration) could lodge a complaint. Four years later, the warden of Oregon State Penitentiary appointed an ombudsman for that institution. In 1972, Director Luger of the New York Division of Youth selected four attorneys, from a list submitted by the Legal Aid Society, to act in that capacity. In the same year, Bennett Cooper, Director of Ohio's Department of Rehabilitation and Corrections, appointed a chief ombudsman and two subordinate ombudsmen; Minnesota passed a statute¹⁷⁷ creating

¹⁷³ *Id.* at 7.

¹⁷⁴ *Id.* at 64.

¹⁷⁵ *Id.* at 8.

¹⁷⁶ HAWAII REV. STAT. §96-1 *et seq.* (1968).

¹⁷⁷ MINN. STAT. §241.01 *et seq.* (1972).

an office of correctional ombudsman, appointed by and responsible to the governor; an ombudsman bill was introduced into the California Assembly which would make the officer answerable to the state legislature.¹⁷⁸ About the same time, proposals were made in Pennsylvania and New York, urging that ombudsman models be established, answerable to *private* organizations, the Pennsylvania Prison Society, and the New York Correctional Association, respectively.

The Pennsylvania experiment lasted for thirty days, because of the apparent disinclination upon the part of the correction's leadership to "suffer with patience the criticisms of a gadfly. . . . It is unlikely that a private ombudsman, dependent on the warden's hospitality, will maintain both militance and favor."¹⁷⁹

The New York Correctional Association scheme,¹⁸⁰ rejected by the governor, did seem to possess a sophisticated design to achieve both credibility with inmates and competence. The plan envisioned four full-time regional ombudsman teams and a fifth (part time) team for the women's facility. Accountable to the association, an organization with a legislative sanction to make inspections in corrections since 1846,¹⁸¹ each member team would visit at least one facility in its region each week. However, to insure their operation within association guidelines and independence from the correctional administration, the pair would be required to spend one day each week in the home office and maintain other continuous contacts. The team would be composed of a lawyer and a social scientist, equal partners hearing grievances in his own specialty. The strictest confidentiality was to be maintained. Each ombudsman was to solve as many problems as possible on a first-person, first-hand basis. If difficulties arose, the team would meet with the General Secretary of the Association. Guidelines included the association's publication, *Rights of Prisoners*, and the U.N.'s *Standard Minimum Rules for the Treatment of Prisoners*.¹⁸² The ombudsman was to be a neutral observer, inquirer, and referral agent, not an advocate for any group in the system. To carry out his task, he was to have access to all pertinent records and the right to inquire and "receive full and complete answers" from any administrator, staff, or inmate. Moreover, he could employ arbitrators of the American Arbitration Association where appropriate.¹⁸³

¹⁷⁸ Calif. Assembly Bill No. 5 (1972) Regular Session, noted in Singer & Keating, *supra* note 118.

¹⁷⁹ Coulson, *supra* note 171, at 613.

¹⁸⁰ Goff & Shaughnessy, *The Feasibility of a Correction Ombudsman — A Report to the Correctional Association of New York* (Jan. 7, 1972 unpublished paper).

¹⁸¹ *Id.* at 20. The power to inspect prisons was granted under Constitution and By-laws of the Correctional Association of New York, Art. XI, sec. 6, as passed by $\frac{2}{3}$ vote of the N.Y. State Legislature (May 9, 1846).

¹⁸² See *supra* note 129.

¹⁸³ Goff & Shaughnessy, *supra* note 180, at 9.

Significantly, the Ohio Task Force on Corrections, in its 1971 report, called for such a non-governmental ombudsman "totally independent from the Division of Correction and from the Executive Branch of the government":¹⁸⁴

It is assumed the ombudsman will report to the Citizens' Advisory Board, work closely with the proposed legal services program, and increase the visibility of the institutions. The function . . . would be to evaluate the grievances of staff and inmates and to use his persuasive powers and that of his office to effect change.¹⁸⁵

It should be noted, however, that the envisioned board, itself, was to be appointed by the Governor.¹⁸⁶ In any event, such a board has not yet been created; and the ombudsman has been appointed by the director and serves at the latter's pleasure. The two deputy ombudsmen are ex-offenders, one black and one white.¹⁸⁷

Results, not merely procedures, are of prime importance to inmates. Ombudsman models have been viewed with some skepticism in the past because ombudsmen could not assure administrative compliance. Clearly, the Minnesota model contains more "teeth" than the Ohio office. Under statute in Minnesota, the ombudsman is given authority to subpoena records and testimony;¹⁸⁸ he may sue in court for legal relief;¹⁸⁹ he may use the services of Legal Assistance to Minnesota Prisoners for legal counsel;¹⁹⁰ and he may refer to proper authorities, actions of public officials and employees warranting criminal or disciplinary proceedings.¹⁹¹ Moreover, his jurisdiction extends to matters affecting parolees.¹⁹²

Presumably, the ombudsman concept envisioned by the Freund Committee¹⁹³ would likewise improve the record of compliance. Yet it is possible that its model, designed basically to slow the flood tide of *in forma pauperis* applications, and to delay court consideration, might not be credible to inmates. Furthermore, the capacity of a central office to provide adequate ombudsman services throughout the nation's state and federal prisons remains open to question as well.

¹⁸⁴ 1971 OHIO TASK FORCE, *supra* note 9, at A10.

¹⁸⁵ *Id.* at A10-11.

¹⁸⁶ *Id.* at A28.

¹⁸⁷ RESPONSE, *supra* note 124, at 6.

¹⁸⁸ MINN. STAT. §241.44h (1972).

¹⁸⁹ *Id.* §241.44i.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* §241.44 subd. 4.

¹⁹² *Id.* §241 *et seq.* (1972).

¹⁹³ FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (Freund Commission) (Wash.: Admin. Office of U.S. Courts, Dec. 1972).

Another federal ombudsman¹⁹⁴ proposal, but limited in application to federal prisons, is similar to the Minnesota model. However, it would seem to provide an even greater measure of independence, since the ombudsman would not serve at the pleasure of any officer, but rather for a five year term, following nomination by the President and approval of the Senate.

The ombudsman concept is applicable, with equal justification, to the mental institution setting. Morton Birnbaum, author of the seminal article, *Right to Treatment*,¹⁹⁵ testified:

I would suggest an investigator — a sort of ombudsman — who would receive a complaint from a patient, or a patient's relative or friend, and who then would have the powers to investigate to see if the hospital is properly staffed, and if the patient is being seen regularly by the staff. If the hospital was inadequately staffed, or if the patient was not being seen regularly, then the investigator could either order the discharge himself or else report to a supervisory body that could order the discharge of the patient.¹⁹⁶

In two bills¹⁹⁷ to create mental institution ombudsmen, there seems a major departure from the traditional concept and from the correctional models. The ombudsman was not to be a *neutral*, receiving and processing complaints and making recommendations. Rather, he was to be the patient's *advocate*.¹⁹⁸ The bills are premised upon the view that because of the patient's condition, the ombudsman has to play a more activist role — informing the individual of his rights, receiving institutional status papers, investigating grievances, inspecting facilities, and channeling legal services.

The Ohio Task Force on Commitment Procedures and Patients' Rights proposed such a Legal Advocacy Service in House Bill No. 984.¹⁹⁹ It is to receive and act upon complaints concerning "institu-

¹⁹⁴ H.R. 8848, 93d Cong., 1st Sess. (1973).

¹⁹⁵ 46 A.B.A.J. 499 (1960).

¹⁹⁶ *Hearings on Constitutional Rights of the Mentally Ill before Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Congress, 1st Sess., at 64 (Nov. 4, 1969).

¹⁹⁷ See note 199, *infra*.

¹⁹⁸ But see N.Y. Times, July 3, 1972, at 10, col. 3, (purpose is to ease pretrial complaints about court procedures; the advocates will investigate cases involving long court delays; act as catalysts and buffers between private counsel, courts, and inmates; look into quality of legal representation; and determine how much time is needed to prepare a case).

¹⁹⁹ 110th Ohio General Assembly, Regular Session, 1973-74; see Strand, *supra* note 59; ENNIS & SIEGEL, *supra* note 1, at 43 (several states have set up legal services within the hospitals to assist patients with respect to hospitalization and release procedure and patients' rights. Those states include Maryland (Mental Health Information and Review Service), Minnesota (Public Operations Office), West Virginia (Patient Advisor), New York (Mental

(Continued on next page)

tional practices and conditions and to assure that all persons detained or hospitalized . . . are fully informed and adequately represented by counsel . . . [and] insure the right of any respondent to hospitalization when such is necessary."²⁰⁰ The Service is to have access to patients, staff, and relevant records; it is to have authority to contract for psychiatric and legal service; and it can seek court redress. Furthermore, it is to be independent from both the department of Mental Health and Mental Retardation, and the Attorney General's office. Significantly, the members of its board of directors are to be chosen in equal number by the three branches of state government. The executive director is to be appointed by the board to a three year term, and be subject to removal only for cause.

Drawing Upon Law Students and Paraprofessionals

Ombudsman models have drawn criticism, in the past, because they have lacked credibility. One reason was that the ombudsman was swamped with complaints in institutions that were not furnishing counsel to handle the myriad of legal concerns. The result was that the ombudsman's role was subverted, since the officer could not be expected to resolve the bulk of the complaints in any timely and meaningful way. Any system for protection of confinee rights, then, must include the availability of such legal services. Hopefully, the establishment and implementation of a federal legal services corporation will furnish more lawyers than under the former arrangement. Inevitably, however, the system will have to tap the growing pool of law students,²⁰¹ as well as preparing "jailhouse lawyers" as paraprofessionals,²⁰² to aid counsel for individual complaints, assist the ombudsman, strengthen grievance procedures, or to function as parole aides.

Arbitration

Another major limitation of the ombudsman model was its inability to assure administrative compliance even of those matters to which the ombudsman gave his attention. He was either perceived as too dependent upon the director's pleasure or so external to the de-

(Continued from preceding page)

Health and Information Service, N.Y. MENTAL HYGIENE LAW §29.09 (McKinney 1972); *Hearings on Constitutional Rights of the Mentally Ill*, *supra* note 12, at 270-71, wherein Ennis observes that the New York MHIS differed in its application within the several districts: "In three of the districts, the MHIS is just that, an 'information service,' and little more. In New York City District, however, the MHIS has become more of a mental health legal service, and has acted more nearly as an advocate of the patient's rights . . . [to] prepare papers, represent the patient in court, cross-examine those who urge hospitalization, explore alternatives to commitment . . ."

²⁰⁰ 110th Ohio General Assembly, Regular Session, 1973-74.

²⁰¹ For summary of law school programs providing legal assistance in correctional contexts, see NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *DIRECTORY OF LAW STUDENTS IN CORRECTION PROGRAMS* (3rd ed. 1970).

²⁰² *Hearings on Corrections*, *supra* note 14, at 82.

partment that he lacked the director's support. Employment upon an ad hoc basis of neutral third-party mediators, agreeable both to an individual or council complainant and to the institutional officer, could also resolve some grievances and reduce the dimensions of an ombudsman's assignment. Indeed, Singer and Keating propose one arbitration model that eliminates the ombudsman. They argue that both sides would be more willing to support decisions by an arbitrator agreeable to both,

since decisions are to be binding in all matters involving interpretation of the written rules or policies of the institution or department. In other matters, including those involving challenges to the written rules or policies themselves, decisions will be advisory.²⁰³

The writers contend that such an arbitrator could not bind an administrator to violate his legal duties; nor would his lack of correctional expertise be a material handicap, given his capacity to tap the knowledge of the disputing parties. Moreover, acceptance of the concept by administrators, they argue, need not mean recognition of inmate collective bargaining rights. Rather, it is viewed as a useful option available to an administrator to resolve some potentially troublesome conflicts with dispatch.

Periodic Visitation or Inspection

Visitation by official and lay groups can provide an important means of identifying or resolving grievances, as well. Some statutes may expressly provide that department heads of operating agencies shall periodically inspect the facilities.²⁰⁴ Even if such authorization is not stated, it is fairly implied from the general grant of authority. The statute may impose an obligation of inspection, *i.e.* the director *shall* inspect;²⁰⁵ or it may provide an option, *i.e.* he *may* do so.²⁰⁶ And there may be specification of how often inspection is to take place.²⁰⁷

Self-inspection by a concerned administrator is valuable. But one puts too much stock in human nature in a closed system — especially in light of the past record — to leave assurance of constitutional and legal protection, and achievement of societal goals, in his hands alone.

²⁰³ Singer and Keating, *supra* note 118; Coulson, *supra* note 171.

²⁰⁴ CAL. WELF. & INST'NS CODE §4109 (West 1973), (the state department of health shall inspect hospitals); MASS. ANN. LAWS ch. 127 §1B (1972), (twice a year, at least, the director of the department of corrections or his delegate shall inspect each county correctional facility); OHIO REV. CODE ANN. §5139.31 (Page 1972), (the Ohio Youth Commissioner may inspect any school or detention home).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

In addition, the traditional government structure has provided for inspection by a haphazard array of other governmental agencies.²⁰⁸ Under Ohio law, for example, the county grand jury is charged with visiting the county jail during each term of court. Its tasks are to observe the diet, accommodations, treatment, and discipline within the jail, and then to report to the court of common pleas.²⁰⁹ Furthermore, the city or general health district commissions *may* provide for the sanitary inspection of local correctional institutions, children's homes, and workhouses;²¹⁰ in California, each judge of the juvenile court *shall*, at least annually, inspect the jails and juvenile lockups.²¹¹ In Massachusetts, county commissioners *must* inspect prisons in their counties.²¹² In addition, official investigating agencies — a state attorney general's office, state civil rights commission, county district attorney's office, etc. — may investigate complaints of violation of law within their respective jurisdictions.

Recent proposals submitted to the Ohio General Assembly during this session reflect the view that such inspection mechanisms are not sufficient. We have discussed House Bill No. 984,²¹³ which calls for a Legal Advocacy Service to assure protection of a patient's rights. There is no express inspection requirement; but such a role can be reasonably inferred from the broad authority given the Service.

House Bill No. 587²¹⁴ would establish a Jail Inspection Bureau in the Department of Rehabilitation and Corrections. The bill would require inspection every two years of state and local correctional facilities in order to determine whether they are complying with established minimum standards. Following timely notice of substandard operation and failure upon the part of the local jail administrator to comply, there would be authority to seek court injunction. Also established would be a Jail Inspection Advisory Committee, composed of members from the General Assembly, along with the department director and the superintendent of the Jail Inspection Bureau. Any member of the committee could also inspect, interview inmates, and examine records. The bill is a meaningful effort to establish minimum

²⁰⁸ See, e.g., OHIO REV. CODE ANN. §3709.26 (Page 1972), (city or general health commission district board of health may provide for the sanitary inspection of local correctional institutions); OHIO REV. CODE ANN. §2939.21 (Page 1972), (county grand jury is to visit county jail during each term of court); CAL. WELF. AND INST'NS CODE §509 (West 1973), (juvenile judge shall at least annually inspect jail or juvenile lockup); MASS. ANN. LAWS ch. 126 §1, *et. seq.* (1972), (county commissions shall inspect prisons in counties twice a year).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Supra* note 32.

²¹⁴ *Id.*

correctional standards throughout the state. Moreover, the bureau staff would be civil servants; unfortunately, its presence as an agency within the Department of Rehabilitation and Corrections would serve to diminish its credibility among inmates.

House Bill No. 308²¹⁵ creates a permanent joint house-senate legislative committee to inspect state and local correctional facilities, as well as to develop and evaluate new programs. The committee is to report its findings to the next general assembly. In encouraging the visitation of jails and state correctional facilities by legislators — and thus increasing the number of influential leaders in favor of correctional reform — it has merit. But legislators busy with many other duties cannot realistically serve as the main monitoring body.

House Bill 235²¹⁶ would require the county grand jury to extend its inspection duties markedly, imposing an obligation of quarterly inspection not only of local correctional facilities but of facilities of the Department of Mental Health and Mental Retardation as well. Some grand juries have been conscientious in the past in performing their task of county jail inspection, during each term of court.²¹⁷ However, several factors militate against assigning the body new responsibilities: it is handicapped by a lack of expertise and continuity of membership; its operation may be undercut by a district attorney who may have other, perhaps political, motivations. Indeed, the grand jury nationally has come to be referred to as the “rubber stamp” of the prosecutor’s office.²¹⁸ Moreover, the local body traditionally has lacked the influence required to move a state legislature to appropriate monies for low-priority concerns like mental health or corrections.

Periodic inspection or visitation by lay or private committees has been another means to assure proper standards of operation. For example, each county in Ohio, by statute, is required to have a board of county visitors,²¹⁹ charged with inspecting all charitable and correctional facilities supported by county or municipal corporation funds. Interestingly enough, they do not actually have to visit the facility, so long as they find some other means of being “fully advised.”²²⁰ The advisory council²²¹ to the Mental Health and Mental Retardation Department is to advise and assist the department. The

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ OHIO REV. CODE ANN. §2939.21 (Page 1972).

²¹⁸ Dash, *The Indicting Grand Jury: A Critical Stage?* 11 AMER. CRIM. L. REV. 807, 820 (1972).

²¹⁹ OHIO REV. CODE ANN. §331.01 (Page 1972).

²²⁰ *Id.*

²²¹ OHIO REV. CODE ANN. §5119.80 (Page 1972).

council is composed of individuals appointed by the governor with the consent of the senate, the members serving three-year terms. There is a similar Youth Services Advisory Board.²²² The board is given express investigatory authority and the duty to visit each institution under the control of the Youth Commission at least semi-annually.

The New York Mental Hygiene Board of Visitors²²³ appears to have substantially greater powers to assure patient protection. The board has power to inspect at any time without prior notice; it has power to investigate all charges against the director and all cases of alleged patient abuse or mistreatment; it has the power to interview patients and employees, and to subpoena witnesses. Annually, it is to make an independent assessment of conditions at the facility. Significantly, its membership — appointed by the governor with the consent of the senate — is to reflect the community served by the particular hospital or school, including some representation of the patient viewpoint and at least one parent of a mentally retarded person.

Ohio's Citizens' Task Force on Corrections recognized the value of such citizen involvement and surveillance. It called upon the governor to appoint a Citizens' Advisory Board "with members representing a cross-section of the community, in order to bring a more dynamic, objective approach to the problems of control and treatment."²²⁴ It proposed that the ombudsman to be appointed should report to the body.²²⁵ In addition, it asked that the Task Force on Corrections be reconvened to review correctional responses to its recommendations. It also called for appointment of additional citizen task forces in the area of "juvenile and misdemeanor corrections (jails and workhouses)."²²⁶

Furthermore, Dr. Eldridge Sharp, chairman of the Ohio State Advisory Committee to the United States Commission on Civil Rights, urged Governor Gilligan to post "neutral citizen observers"²²⁷ in the troubled prison at Lucasville to help protect inmates' civil rights:

We have received extensive information from both inmates and staff . . . that systematic violation of basic civil and human rights is occurring there on a regular basis . . . [N]obody really knows what happens between inmates, guards, and other staff at the prison on a day-by-day basis.²²⁸

²²² OHIO REV. CODE ANN. §5139.14 (Page 1972).

²²³ N.Y. MENTAL HYGIENE LAW §7.19 (McKinney 1972-73).

²²⁴ 1971 OHIO TASK FORCE, *supra* note 9, at A28.

²²⁵ *Id.* at A10.

²²⁶ *Id.* at v.

²²⁷ Cleveland Plain Dealer, Aug. 11, 1973, at 6A, col. 4.

²²⁸ *Id.*; Sharp's committee had earlier sent field teams in to inspect Ohio's prisons and had conducted hearings in July, 1973.

And as noted earlier, Judge Johnson, in *Wyatt*,²²⁹ established human rights committees. Such groups were to have far-reaching duties to ensure that the Alabama state mental hospitals complied with the minimum constitutional standards that he had imposed. The standing committees were to:

... review ... all research proposals and all rehabilitation programs, advise and assist patients who allege that their legal rights have been infringed or that the Mental Health Board has failed to comply with the judicially ordered guidelines. At their discretion the committees may consult appropriate independent specialists who shall be compensated by the Board.²³⁰

In a letter to Dr. McCafferty, chairman of the human rights committee for Searcy Hospital, the federal judge elaborated: "[T]he committee may, at reasonable times, inspect the records of the institution and interview the patients and residents, as well as the members of the staff."²³¹ Judge Johnson instructed McCafferty's committee to "establish a good rapport with the hospital administration ... [and] a rather close coordination ... between the three ... committees."²³² A subcommittee should be created:

to inspect any deficiencies in the operation of the physical plant and in the administration of patient services; one for incidents and complaints, and another for available financing and the effective use thereof ...²³³

Clear and effective lines of communication should be established and maintained:

... [Notices should be placed] throughout the institution which outline and describe the committee's purposes; list the names and addresses of the members of the committee and the subcommittees; make clear the committee's willingness to hear and investigate complaints from resident/patients and members of the staff. The hospital officials are required to allow patients and employees to be available to the committee. ... [A]ssurance should be given that no reprisals will be made for any reports or complaints that are made by either the staff or the resident/patients to the committee.

²²⁹ *Wyatt v. Stickney*, 344 F.Supp. 373 (M.D. Ala. 1972).

²³⁰ *Id.* at 376.

²³¹ Letter from Hon. Frank M. Johnson, Jr., Chief Judge, U.S. District Court, Middle District, Ala. to Dr. E. L. McCafferty, Chairman, Human Rights Committee for Searcy Hospital, Ala., Aug. 8, 1972.

²³² *Id.*

²³³ *Id.*

. . . [R]eports should be made to the committee, in writing, on the progress being made by the hospital officials in meeting the Court's standards . . .

. . . [P]eriodic inspection of the buildings and informal discussion with employees of the staff and patients is one of the essential methods of securing information. . . . However, more formal procedures should be [established] for receiving reports and making recommendations.²³⁴

While it remained the duty of the mental health board and the commissioner to implement the standards, it was the committee's clear responsibility both to determine the extent of compliance and to use its membership to facilitate improvements.

Periodic inspection by an "official" accrediting agency is another means of improving conditions within confinement institutions. The Joint Commission on Accreditation of Hospitals, a voluntary organization, supported by its member hospitals, accredits hospitals throughout the country. Lack of accreditation has an adverse effect upon the hospital's capacity to attract doctors, staff, and government funding. Yet it has been estimated that "at the very most, one-third of the state psychiatric hospitals are accredited by the commission."²³⁵ And an even lesser percentage of facilities for care of the mentally retarded would meet accreditation standards. For the past year, there has been an active commitment by the Joint Commission through a subordinate body, to institute inspection of such mental retardation facilities. Legislative requirement of accreditation certainly could provide an impetus for improvements in patient care.

In corrections, the American Correctional Association similarly has sought to function as an accrediting agency.²³⁶ And HR 14327²³⁷ would create a national prison standards administration whose duty it would be to develop and enforce such rules for the maintenance of minimum standards for the treatment of prisoners.

Moreover, visitation by specialized groups of judges, attorneys, doctors, social scientists, and law students can furnish another source of responsible awareness and input. This is so, even if tours are

²³⁴ *Id.*

²³⁵ Birnbaum, *Some Remarks on the Right to Treatment*, 23 ALA. L. REV. 623, 628 (1971). If a hospital is certified by JCAH, it is automatically certified by the Social Security Administration to receive Medicare and Medicaid funds; otherwise it must seek an independent certification by the Social Security Administration.

²³⁶ *Hearings Before Subcommittee No. 3 of the Comm. of House Comm. on the Judiciary*, 92d Cong., 2d Sess., Corrections, pt. VI, at 103 (1972) (Remarks of Peter B. Bensinger, Director of Ill. Department of Corrections, and Arthur V. Huffman, Ill. state criminologist, noting that the Ill. Dept. of Corrections supports ACA in its efforts to formalize procedures for accrediting of facilities as well as licensing of personnel).

²³⁷ 92nd Congress, 2d Sess. (1972).

choreographed to show the institutions in their best light. The chairman of the Ohio Citizens' Task Force on Corrections, Judge Bernard Friedman, expressed the wish that: "... every judge ... would take the time ... and visit our prison system ... We would then have a complete change in the direction in which judges go."²³⁸

On occasion, such visiting groups engage in simulations, spending a night inside a prison in order to understand how an inmate feels. Such role playing cannot hope to provide a true picture of an inmate experience. Yet, it probably reinforces the concern that the visitors — willing to volunteer for such a venture — brought with them concern about the need for improvement.

Ordinary lay groups are visiting the institutions with increasing frequency. They are not coming for the avowed purpose of inspection, but rather to provide meaningful community programs for those in custody. Nonetheless, they are part of a needed effort to open the institutions to continuing public attention. The Ohio Citizens' Task Force called for the "increased involvement of citizens civic groups, church groups, volunteers, and outside professionals) in group programs in our institutions."²³⁹ Director Cooper concurred in the need:

Recent past and current months are seeing the increased involvement of citizens and citizens groups in the Department's programs, for both confined and released offenders ... including the volunteering of inmates to serve individuals and groups in the community. Jaycees, Concern and Seventh Step are among those groups which have been providing services to Departmental clients.

... A new position, Director of Volunteer Services, has been established. This person will enable and direct the substantial contributions to be made by concerned and capable citizen volunteers ... [H]owever, proper screening, training and supervision of such persons is essential.²⁴⁰

Cooper also gave his support to the recommendation that the Adult Parole Authority cooperate with the state bar association in setting up seminars dealing with parole procedures. He noted that the Authority would participate "vigorously" in the ABA Young Lawyers program seeking young attorneys as parole officer aides.²⁴¹

²³⁸ *Hearings on H.R. 13118, (Corrections) and Related Bills re Federal and State Parole Systems, Before Subcommittee No. 3 of the House Committee on the Judiciary*, 92nd Cong., 2d Sess., pt. VII, at 632-33 (1972).

²³⁹ 1971 OHIO TASK FORCE, *supra* note 9, at A18.

²⁴⁰ RESPONSE, *supra* note 123, at 46.

²⁴¹ *Id.* at 69.

Finally, the press can provide another source of outside monitoring upon the system. Indeed, it was a series of press articles on conditions at Lima State Hospital in Ohio that led to grand jury indictments and to recent reforms instituted by the Director of Ohio's Mental Health and Mental Retardation Department. The Director announced that he was appointing ombudsmen, as well as investigators, and that he was further centralizing departmental operation.²⁴²

The Author's Proposal

Any array of monitoring programs and devices should serve three purposes: (1) ensure against blatant administrative abuse; (2) fairly resolve legitimate resident concerns; and (3) enlarge the constituency seeking more basic changes to better accomplish societal goals. Yet the approaches we have considered have had major weaknesses. Programs have not been applied in any systematic way; generally, they have been at the sufferance of the in-custody administration; they have lacked adequate means to achieve meaningful compliance; and only sporadically have they provided visibility to community-based efforts or in-custody administration.

What is called for are more effective structures to develop, standardize, and coordinate diversion planning and comprehensive monitoring programs. To work, such structures must possess accountability, credibility, competence, and energy.

To meet that need, the author proposes the establishment of a system of regional commissions within each state. Overseeing the commissions would be a state board made up of individuals, chosen in equal number by the three branches of state government. The state board would establish minimum standards for developing programs of diversion, community-based treatment and rehabilitation, employment by professional and lay volunteers, grievance procedures, and periodic monitoring. In developing such standards, the board would meet with administrators and staff of the varied institutions affected, as well as with other government officials and interested private organizations.

The state board would appoint individuals to the regional commissions. Each commission would be composed of persons from within the region, such individuals possessing backgrounds in law, corrections, mental health, the social sciences, and accounting. They would include a current confinement administrator and an ex-inmate or resident. Members would serve for a fixed term but be removable by the state board upon just cause. Under the state board's guidelines, the commission would: propose diversion programs; recommend

²⁴² *Cleveland Plain Dealer*, June 30, 1973, at 6C, col. 1.

grievance mechanisms to meet the requirements of particular institutions; appoint, subject to state board approval, "circuit-riding" or in-residence ombudsmen; contract for legal services; select third-party mediators agreeable to administrator and complainant; tap volunteers for in-custody and post-release support programs; propose institutional staff recruitment and training programs; assign field teams to periodically investigate confinement institutions within the regions and make annual public reports.

Field teams would be designated from within the commission's membership, or from added ad hoc membership (specifically approved for that purpose by the state board). The purpose of the periodic investigation would be to determine whether the confinement systems are conforming to state-wide legislative and administrative standards respecting physical plant, facilities, programs, staffing, and confinee rights. Such field teams would have subpoena power and would determine whether it was appropriate to meet with inmate and staff complainants in private, and to take such other measures as necessary to assure against reprisal.

The function of the ombudsman would be different from that of the field teams. Generally, he would receive, and refer or attempt to resolve, individual grievances. The field teams, by contrast, would seek to get a more systematic picture of *institutional* operation. State guidelines or commission policy might call for ombudsmen serving mental institutions to play a more activist role in apprising patients of their rights and assuring access to attorneys for their individual needs. In the correctional setting, the commission might determine that his role would be to handle minor complaints, leaving more serious or troublesome issues to be left to arbitration, legal services, commission "good offices," or resort to the courts.

The commission would meet from time to time with administration and staff of the respective departments and of some of the facilities, to ensure that the functions of the commission were understood, and cooperation sought.

Resident-ombudsman, field teams, and other commission staff would be required to visit headquarters frequently to assure both understanding of commission objectives and meaningful independence from the confinement administrations being examined.

Where a commission determined that there had been a failure to abide by state-wide standards, without sufficient justification, it would seek court relief to ensure compliance. Moreover, where ombudsmen or field teams determined that there was a serious violation of such standards, and that delay would endanger resident or staff, they could seek court remedy as well. Ordinarily, however, ombudsmen would refer individual grievances to the appropriate parties,

including legal services; and the field teams would make reports to the commission respecting current conditions and options available.

Each commission would contract with a university institute within the region in order to provide a professional staff; establish research projects; develop staff training programs; and coordinate faculty and student assistance in various phases of the monitoring, diversion, or grievance systems.

The commission would have an executive director, chosen by its members, with the approval of the state board. He would serve for a fixed term, but be removable for cause by the commission. He would direct the staff, provide commission members with information adequate to carry out their mandate, coordinate the varied programs of the commission, and assure that the body was in close coordination with its fellow commissions.

The commission would make an annual report of its activities, findings, and recommendations. Copies would be sent to the three branches of government, the state board, and the other commissions; additional copies would be on file in university libraries in the region, and available to the press. The state board would also make an annual report, with like distribution.

The proposal extends to *all* confinement institutions — mental hospitals, jails, juvenile facilities, and adult correctional institutions. However labeled, such institutions have housed individuals sharing a common devastating experience: their liberties have been substantially taken away in environments of stark neglect or wilful injury. Too often, they have been treated as less than human. Thus, monitoring is necessary both to assure some level of human dignity within confinement, and to promote meaningful reform.

The model provides for structures that can be held accountable. Members of the state board are to be chosen in equal numbers by the three state branches. The regional commissions, in turn, are appointed by the state board. The arrangement assures that each of the three branches has a check, but it prevents any one branch from exercising an undue influence upon the commissions.

Moreover, each commission is independent of the agencies that it is charged with assisting and monitoring. Members are not dependent, either for tenure or pay, upon the in-custody directors; to that extent, they will be more able to resist coercion.

The commission should prove more credible to residents or inmates than past mechanisms. We have noted its independence — along with that of its component appointees — of the confinement administration. In addition, it can contract with legal services and arbitrators to resolve group or individual grievances; it can seek court relief to compel compliance; its membership reflects representation,

not by political bureaucracy, but rather by the diverse communities involved, as well as by individuals with backgrounds and expertise in the areas. Its programming can foster efforts for diversion and community alternatives. Moreover, its presence in the region should serve as an important symbol of concern as well as a useful means for tapping local manpower.

Initially, it will no doubt be difficult to gain the cooperation of department heads, facility directors, and general staff. The commissions, in effect, watch them at work, in order to prevent abuses and make recommendations. Yet the commission structure offers a new opportunity to such individuals. For too long, administrators have been unable to move up legislative priorities in funding for mental health and corrections. Two results followed: failure to attract and retain high quality personnel; and an inability to employ meaningful treatment or rehabilitative programs, except upon an experimental and limited basis. The commission structure and reporting system could provide the kind of sounding board needed to increase funding and support of legitimate administrator concerns.

Moreover, particularly in corrections, administrators recognize that meaningful change is called for to stem a growing tide of violence and disruption by organized prisoner groups. At least some of those administrators will understand that reforms are not necessarily directed toward challenges to their own skills or dedication. Rather, new approaches are required to prevent abuses that have long existed in such closed systems of confinement. Most administrators, no doubt, recognize that only a joint undertaking, by diverse professional and lay publics, together with the confinement administration, can achieve societal goals of protection and fair treatment.

Some institutional staff will welcome the establishment of commissions, seeing in them powerful new allies in their effort to obtain support services. Others may be resentful and suspicious, because the commission's actions may reflect unfavorably upon their performances. Such persons may have legitimate concerns about safety, job security, pay, or working conditions.

The cooperation of staff is vital if the commission is to achieve its goals. Perhaps such cooperation could be fostered by enlarging staff opportunities for advancement within the system, by substantially increasing pay scales, by providing improved training, and by involvement in college programs. In any event, such programs should be offered to staff in fairness to the many conscientious individuals who have labored hard to bring humanity into the confinement institutions or were placed in such settings with almost no preparation.

The regional commissions will contract with local university institutes. Such institutes can provide training programs, not only

for security and service staff, but for inmates and ex-inmates as well. The institutes also can furnish some of the skilled manpower contracted for in the various commission programs.

The commission not only can tap faculty and students from within the university; it also can seek out professional and lay groups from the local community to volunteer their services, whether to provide job opportunities, participate in learning experiences with residents, or afford more specialized skills.

The channeling of community groups into confinement administration reflects the dual mission of the regional group: to keep out of the large confinement institutions the many persons who do not belong there, as well as to assure the most reasonable treatment of those who require detention. The commission is not simply concerned with achieving adequate monitoring programs for confinement institutions. Such a limited goal might well prolong such systems in their basic repressive form.

Moreover, external examination is to take place on two levels: the ombudsman's attention is directed toward individual instances of grievance, and the field teams seek an overall assessment of institutional operation. The first is to assure prompt attention to particular complaints. The second is to serve as a primary basis upon which commission recommendations to the state board and the three branches of government are made.

Ombudsmen and field teams will be faced with countless places of confinement to inspect: local jails, community treatment centers, and half-way houses within their region, to name just a few. To meet that need, circuit-riding ombudsmen and ad hoc field teams (duly approved by the state board) can be appointed. Of course, regional jail or detention systems, proposed by the ABA Commission on Correctional Facilities and Services,²⁴³ could ease the problem.

The commission could establish subcommittees, composed of individuals knowledgeable in the respective detention and treatment environments as well as subcommittees in functional areas: physical plant, financing, law, etc.

The proposal does not seek to interfere with agency self-examination or other governmental inspection. Indeed, it should spur administrators to keep a closer check upon their subordinates. The commission may determine that a particular facility will be overburdened with multiple inspections, adversely affecting legitimate operation. In such a case, it may approve joint inspection, to the extent that commission credibility is not undermined.

²⁴³ *Hearings on Corrections*, *supra* note 14, at 218.

The annual reporting system would furnish systematic knowledge about confinement administration and diversion. The general public would have ready access to the reports, housed in university libraries, and made available to the press. The reports, together with the other commission projects, could provide the diverse specialized and lay publics, along with inmates, the kind of information necessary to achieve both individual relief and changes in the pattern of operation.

The state board and regional commissions, under state and federal guidelines, could serve as bodies recommending in favor of or against federal spending for particular institutions or programs.

In addition, a federal board with subordinate federal commissions could be structured similarly to the author's model, to provide for diversion planning and monitoring of in-custody federal confinement institutions.

This proposal is based upon three ideas. First, a free society is obliged to seek out areas hidden from view to assure protection of fundamental rights and the achievement of societal goals. Second, limitations on human freedom should not be based upon arbitrary decision, but on reasoned and compelling need. Third, citizens acting in their local and regional communities, under state and federal guidelines, *can* provide a mechanism to further constitutionalism, not merely in theory, but in practice as well.